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INDEX

Page

Airsignal International, Inc., et al.; docket No. 19801 et al. (F.C.C. 73-858) 407

California Water and Telephone Co. et al.; docket No. 16928 et al. (F.C.C. 73-857) 410

Clovis Broadcasters; docket No. 13995 (F.C.C. 73D-33) 412

Colorado West Broadcasting, Inc., et al.; docket No. 19588 et al. (F.C.C. 73R-291) 417

Comcast Corp. et al.; file No. CAC-1242 et al. (F.C.C. 73-825) 420

Community Coalition for Media Change; re request for financial data of Station KDIA 424

Fairness Doctrine Ruling; re complaint by Accuracy in Media, Inc., against Station WNBC 426

Fairness Doctrine Ruling; re complaint by Henry M. Buchanan against Columbia Broadcasting System 430

Fairness Doctrine Ruling; re complaint by Females Opposed to Equality against Station WBRZ-TV 434

Fairness Doctrine Ruling; re complaint by Robert C. Greene against Station WGY 436

Fairness Doctrine Ruling; re complaint by Horace P. Rowley, III against Station WNYC 438

FM Table of Assignments; docket No. 19738 (F.C.C. 73-839) 442

Home Air Service, Inc., et al.; docket No. 19618 et al. (F.C.C. 73D-32) 444

KBLU Broadcasting Co.; file No. BAL-7794 et al. (F.C.C. 73-836) 450

Mission Denver Co.; file No. BAL-7409 (F.C.C. 73-860) 451

Mocatta Metals Corp. et al.; docket No. 19799 (F.C.C. 73-822) 453

Payment of Forfeitures; amendment of part 1 (F.C.C. 73-855) 456

Personal Attack Ruling; re complaint by Mrs. Rita Moore against Station KRBN 458

Pole Attachment Proceeding; public notice (F.C.C. 73-851) 460

Reregulation of Broadcast Rules; docket No. 19712 (F.C.C. 73-861) 461

RKO General, Inc., et al.; docket No. 18759 et al. (F.C.C. 73R-292) 469

Rowley, Horace P., III, Esq.; re request to reverse staff action 481

Rush Broadcasting Corp.; re notice of apparent liability for forfeiture (F.C.C. 73-844) 483

Rush Broadcasting Corp.; re notice of apparent liability for forfeiture (F.C.C. 73-843) 486

Schofield Broadcasting Co., Inc., et al.; file No. BALH-1624 et al. (F.C.C. 73-831) 490

Southern Broadcasting Co. et al.; docket No. 18906 et al. (F.C.C. 73R-287) 496

Tri-Cities Broadcasting Co. et al.; file No. BALH-1658 (F.C.C. 73-835) 499

United Broadcasting Co. of Florida, Inc.; docket No. 19664 (F.C.C. 73R-299) 502

F.C.C. 73-858

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
AIRSIGNAL INTERNATIONAL, INC. For a Construction Permit To Establish New Facilities in the Domestic Public Land Mobile Radio Service at Memphis, Tenn.	Docket No. 19801 File No. 1970-C2-P-72
MAHAFFEY MESSAGE RELAY, INC. For a Construction Permit To Establish Additional Facilities For Station KRS 656 in the Domestic Public Land Mobile Radio Service at Memphis, Tenn.	Docket No. 19802 File No. 3443-C2-P-72

MEMORANDUM OPINION AND ORDER

(Adopted August 8, 1973; Released August 15, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE, REID AND HOOKS ABSENT.

1. The Commission has before it for consideration an application filed October 6, 1971 by Airsignal International, Inc. (Airsignal) and an application filed December 9, 1971 by Mahaffey Message Relay, Inc. (Mahaffey). Airsignal's application is for a construction permit to establish a new one way signalling (paging) service in the Domestic Public Land Mobile Radio Service (DPLMRS) at Memphis, Tennessee, which would operate on 158.70 MHz. Mahaffey's application is for a construction permit to establish an additional one-way signalling service at Memphis, Tennessee in the DPLMRS using the same frequency of 158.70 MHz.

2. The applicants are each seeking to provide communications service on the same frequency in the same geographical area, and since a grant of both applications would result in harmful electrical interference, the applications are mutually exclusive. Moreover, since both applicants appear to be legally, financially, and otherwise qualified to construct and operate the proposed facilities a comparative hearing is necessary to determine which of the two applicants is better qualified to operate the proposed facilities in the public interest.

3. It appears from the application of Airsignal that it is a Delaware corporation, with its principal office located at 201 E. Ogden Avenue, Hinsdale, Illinois. Airsignal is the licensee of one station in Memphis operating in the DPLMRS. The station, KIF 653, is a low-band paging station operating on 35.22 MHz. Airsignal is a subsidiary of Western Union International, Inc. ("WUI"). While the 1972 Form L for Airsignal has yet to be received by the Commission it appears the company, as a subsidiary of WUI, is more than capable of meeting

the $38,850 cost that will be incurred in carrying out its proposed construction.

4. Mahaffey is a Tennessee corporation, with its principal office located at 2972 Sandbrook Avenue, Memphis, Tennessee, and is the licensee of one station in Memphis, operating in the DPLMRS. The station, KRS 656, is a VHF paging station operating on 152.24 MHz. Mahaffey's combined Annual Report (Form L) for its station indicates that its total assets are $112,005 with a net income of $28,262.26. Modification cost as stated in the instant application is $2,500.00. Mahaffey, therefore, appears to be financially qualified to complete this proposed modification. The stockholders of Mahaffey owning 10%, or more, of the stock are Bell S. Mahaffey (50%) and John W. Mahaffey (50%). Both of the foregoing reside in Memphis, Tennessee.

5. Technically, Airsignal proposes a General Electric Model ET–70–C base station transmitter with both 16F3 and 15F2 emissions, to be located in Memphis. Input/Output powers will be 375 and 250 watts, respectively; and the antenna will be at a height of 300 feet above ground. Regular and emergency maintenance of the system will be provided on a full time basis by Logan and Lesh Communications of Memphis, which employs at least one person with a Second Class Radiotelephone license. Mahaffey proposes a General Electric Model ET–9–C–5 base station transmitter with 16F3 and 15F2 emissions to be located in Memphis. Input/Output powers will be 500 and 250 watts respectively, and the antenna will be at a height of 336.5 feet above the ground. Regular and emergency maintenance will be provided by Mahaffey.

6. Both applicants allege that there is presently a growing need for signalling service in Memphis, and while the justifications of each are dissimilar in basis they are compatible in kind. Airsignal, in response to a Commission letter of April 19, 1973 indicates that a telephone survey of the Memphis area resulted in no less than 681 potential subscribers to its proposed new service.

7. Mahaffey bases its justification on what it alleges to be the basic incompatibility of tone-only and tone-plus-voice paging. In other words, Mahaffey proposes to devote one channel to tone-only paging and the other channel to tone-plus-voice paging only. Mahaffey proposes this arrangement as a solution to frequency congestion problems which it says are the result of an ever-increasing load of customers and the non-compatibility of its two services. Since the Commission has found that tone-only paging is compatible with tone-plus-voice paging, the alleged incompatibility of the two modes does not provide justification for the grant of an additional radio channel. *Empire Communications Co.*, 31 FCC 2d 477 (1971). Therefore, there is a question of whether the traffic load study and other data submitted by Mahaffey, sans any consideration of mode incompatibility, will support its request for an additional channel.

8. The applicants have been unable to agree on a time sharing arrangement for use of the radio channel applied for.

9. In view of the foregoing, IT IS ORDERED, That pursuant to Sections 309 (d) and (e) of the Communications Act of 1934, as amended (47 U.S.C. §§ 309 (d) and (e)), that the captioned applications of AIRSIGNAL INTERNATIONAL, INC. and MAHAFFEY

MESSAGE RELAY, INC. are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING upon the following issues:

1. To determine the nature and extent of services proposed by each applicant, including the rates, charges, personnel, practices, classifications, regulations, and facilities pertaining thereto.

2. To determine the total area and population to be served by Airsignal International, Inc. within the 43 dbu contour of its proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations and to determine the need for its proposed service in that area.[1]

3. To determine the total area and population to be served by Mahaffey Message Relay, Inc. within the 43 dbu contour of its proposed station, based upon the standards set forth in Section 21.504 of the FCC Rules and Regulations; and to determine the need for the proposed service in that area.[1]

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the above-captioned applicants would better serve the public interest, convenience and necessity.

10. IT IS FURTHER ORDERED, That the hearing shall be held at the Commission offices in Washington, D.C. at a time and place, and before an Administrative Law Judge, to be specified in a subsequent order.

11. IT IS FURTHER ORDERED, That the Burden of proof upon Issue 2 is upon Airsignal Inc.; the burden of proof upon Issue 3 is upon Mahaffey Message Relay, Inc.; and the burden of proof upon Issues 1 and 4 is upon both applicants.

12. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is made a party to the proceeding.

13. IT IS FURTHER ORDERED, That applicants and party respondent may avail themselves an opportunity to be heard by filing with the Commission pursuant to Section 1.221(c) of the Commission's Rules within twenty days of the release date hereof, a written notice stating an intention to appear on the date set for the hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[1] Section 21.504(a) of the Commission's Rules and Regulations describes a field strength contour of 43 decibels above one microvolt per meter as the limit of the reliable service area for base stations engaged in the one-way communications service. Propagation data set forth in Section 21.504(b) are a proper basis for establishing both the location of the service contours and the areas of harmful interference for the facilities involved in this proceeding.

F.C.C. 73-857

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CALIFORNIA WATER AND TELEPHONE CO. Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2 Applicable to Channel Service for Use by Community Antenna Television Systems	Docket No. 16928
In the Matter of THE ASSOCIATED BELL SYSTEM COS. Tariffs for Channel Service for Use by Community Antenna Television Systems	Docket No. 16943
In the Matter of THE GENERAL TELEPHONE SYSTEM AND UNITED UTILITIES, INC. COS. Tariffs for Channel Service for Use by Community Antenna Television Systems.	Docket No. 17098

ORDER

(Adopted August 8, 1973; Released August 10, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE, REID AND HOOKS ABSENT.

1. On October 12, 1966, the Commission designated for investigation and hearing the CATV channel service tariffs of the California Water and Telephone Company (5 FCC 2d 229). Subsequently, the CATV channel service tariffs of numerous other telephone companies were included in this investigation. The evidentiary hearings upon the issues in this proceeding concerning the lawfulness of such tariffs were deferred by the Commission and the Administrative Law Judge was ordered to expedite the hearing on the question of jurisdiction over the policies and practices of telephone companies, electric utilities and others with respect to pole line attachment or conduit agreements or arrangements with CATV operators. (22 FCC 2d 10) on May 22, 1973, the Commission terminated the evidentiary proceeding as to such jurisdictional issues and left the issues on the lawfulness of the telephone company channel service tariffs for a further evidentiary proceeding. (FCC 73-541)

2. On May 31, 1973, the Chief, Common Carrier Bureau and the Chief, Cable Television Bureau addressed a letter to all the parties herein inquiring as to whether the public interest still required exploration of the lawfulness of these tariffs and if so, which specific areas should be examined. A public notice, Report No. 8598 (03180) relating

the text of the letter was issued June 1, 1973. Except for the California Community Television Association (CCTA), all of the parties responding, concluded that the public interest did not warrant the continuation of this proceeding.

3. CCTA contends it is difficult to assess its position on the need for further hearings in this proceeding until this Commission has decided the basic jurisdictional question concerning pole and conduit agreements and arrangements which was argued *en banc* July 24, 1973. CCTA suggests the best course of action is to reserve the Commission's option to reconvene the evidentiary hearing until the Commission is satisfied this proceeding has served its purpose. We do not agree. As the parties have noted, this proceeding has been pending for more than six and one half years and many changes have occurred which raise doubts about the need for further proceedings. For example, many telephone companies have discontinued CATV channel service and cancelled their tariffs. Other telephone companies, not included as parties in this proceeding, are now providing CATV channel service; while others have made substantial revisions in their tariffs which appear to remove certain questions of lawfulness therein. It does not appear to be orderly procedure or in the public interest, therefore, at this time to continue with a generalized proceeding as now constituted herein. The availability of informal or formal complaint procedures provide a suitable remedy for any party who may be aggrieved by a particular tariff. Moreover, we fail to perceive any procedural nexus between the question of our jurisdiction concerning pole and conduit arrangements on the one hand and the lawfulness of CATV channel service tariffs on the other hand. We therefore, conclude that we should, on our own motion, terminate the hearing in Docket 16928 et al. concerning the CATV channel service tariffs.

4. Accordingly, in view of the foregoing, IT IS ORDERED, That further proceedings in Docket Nos. 16928, 16943 and 17098 on CATV channel service tariffs ARE HEREBY TERMINATED, Without prejudice to any party, by properly supported complaint or petition, challenging the validity of any CATV channel service tariff in issue in such dockets.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73D-33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
ELBERT DEAN, AND GEORGE E. GAUTNEY
CARL T. JONES, A PARTNERSHIP, D.B.A.
CLOVIS BROADCASTERS
CLOVIS, CALIF.
For Construction Permit

Docket No. 13995
File No. BP-12728

APPEARANCES

Lorie M. Molnar, *B. Jay Baraff*, and *James A. Koerner*, on behalf of Clovis Broadcasters; *Vernon L. Wilkinson*, on behalf of KABC and KGO; *Robert A. Woods* and *A. L. Stein*, on behalf of KUZZ; *Andrew G. Haley*, *William J. Potts, Jr.*, and *Stanley Sporkin*, on behalf of KDAN; *Richard M. Riehl*, *Joseph Stirmer*, *Walter C. Miller*, and *Robert W. Ross*, on behalf of the Chief, Broadcast Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE LENORE G. EHRIG

(Issued June 12, 1973, Effective August 8, 1973 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. The application of Clovis Broadcasters, then a partnership composed of Elbert H. Dean and Richard E. Newman, for authority to construct a new station in Clovis, California, on 790 kHz with a power of 500 watts, daytime only, employing a directional antenna, was designated for consolidated hearing together with a number of other applications by Order adopted March 15, 1961. At the time of designation there were four applicants seeking essentially identical facilities. Three of the applicants have since dismissed their applications, leaving only the application of Clovis Broadcasters. As a result of these dismissals, a number of the issues specified in the original Hearing Order became moot. At the request of Clovis Broadcasters, the Review Board included an additional issue by Memorandum Opinion and Order released January 16, 1973.

2. The present issues in this proceeding, reworded and renumbered to reflect the dismissal of other applications, and including the issue added by the Review Board, are as follows:

> 1. To determine the areas and populations which would receive primary service from the proposal and the availability of other primary service to such areas and populations.
>
> 2. To determine the nature and extent of the interference, if any, that the proposal would receive from all other existing broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from the proposal.

3. To determine whether this proposal would cause objectionable interference to Stations KGO, San Francisco, California, KABC, Los Angeles, California, and KUZZ, Bakersfield, California, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

4. To determine whether the interference received by the proposal from any existing stations would affect more than ten percent of the population within its normally protected primary service area in contravention to Section 3.28(c)(3) of the Commission's Rules and, if so, whether circumstances exist which would warrant a waiver of said section.

5. To determine whether the proposal of Clovis Broadcasters violates the provisions of Section 1.569(b)(2)(i)[1] of the Commission's Rules and, if so, whether good cause exists for waiver of the provisions of said Section.

6. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether the proposal of Clovis Broadcasters should be granted.

3. Prehearing conferences in this matter were held on April 12, 1961, September 18, 1961, November 18, 1965, September 14, 1972 and January 23, 1973. Hearing was held on March 26, 1973, on which date the record was closed. Findings of Fact and Conclusions were filed by Clovis Broadcasters on May 21, 1973. Although a date was set for the filing of reply findings by the Bureau if it deemed such pleading necessary, no filing was made.

FINDINGS OF FACT

Issue No. 1

4. The area within the 2.0 mv/m contour of Clovis Broadcasters' proposal is 2,125.8 square miles including a population of 328,296. Within the 0.5 mv/m contour there are 7,025.5 square miles and a population of 444,283. Within the primary service area, 367.4 square miles with a population of 18,270 persons will be subject to co-channel interference from station KABC, Los Angeles, California. Thus, the interference-free contour of the Clovis Broadcasters' proposal includes 6,658.1 square miles and 426,013 persons.

5. Two other standard broadcast stations provide primary service to 100% of the area within the 0.5 mv/m contour. Four standard broadcast stations and one FM broadcast station provide primary service to 75 to 99% of that area. 50 to 74% of the area receives primary service from one additional standard broadcast station. Two standard broadcast and two FM broadcast stations serve 25 to 49% of the area. The minimum number of existing aural services available in the area is four and the maximum number is in excess of 12.

6. The Clovis Broadcasters' proposal will provide 2.0 mv/m or greater service to five cities and communities with populations in excess of 2,500. Those cities presently receive a 2.0 mv/m or greater signal from five other standard broadcast stations.

---

[1] Section 1.569(b) reads in pertinent part as follows:

(b)(1) The provisions of this paragraph apply to the following frequencies: 680, 690, 710, 730, 790, 800, 810, 850, 860, 900, 1010, 1050, 1060, 1070, 1130, 1140, 1150, 1170, 1190, and 1220 kHz; and 740 kHz with respect to the Class I–A clear channel 750 kHz.

(2) Applications for new stations on, change of existing stations to, or for any major change in operation of stations presently operating on the designated frequencies will be accepted for filing and acted upon in normal course provided they are accompanied by appropriate exhibits and necessary supporting data to show clearly the following with respect to all Class I–A channels within 30 kHz of the designated frequency:

(i) The proposed transmitter site is located inside the area encompassed by a 500 mile extension of the 0.5 mv/m-50 percent nighttime contour of Class I–A stations on unduplicated channels.

Issue No. 2

7. The proposal of Clovis Broadcasters will receive co-channel interference from station KABC, Los Angeles, California. This interference will affect 18,270 persons in an area of 367.4 square miles.

8. The entire area subject to such interference from station KABC presently receives 0.5 mv/m or greater service from a minimum of five other standard broadcast stations.

Issue No. 3

9. Clovis Broadcasters' proposal will cause interference to second-adjacent channel station KGO, San Francisco, California. This interference will affect a total of 3,039 persons in an area of 103 square miles.

10. At least seven other standard broadcast stations place a signal of 0.5 mv/m or greater over the entire KGO interference area.

Issue No. 4

11. The population within the normally protected 0.5 mv/m contour of Clovis Broadcasters' proposal is 444,283 persons. Co-channel interference from station KABC will affect a total of 18,270 persons, representing 4.1% of the total population within the normally protected contour. Such interference will exist in an area of 367.4 square miles of the 7,025.5 square miles within the 0.5 mv/m contour, in about 5.2% of the total area.

Issue No. 5

12. The proposed location of Clovis Broadcasters' station is located outside a 500-mile extension of the 0.5 mv/m 50% contour of station WBAP operating on 820 kHz. The Clovis Broadcasters' application requests operation on 790 kHz, 30 kHz removed from WBAP's unduplicated frequency. The 0.5 mv/m contour of station KGO, San Francisco, California, operating on the frequency 810 kHz, almost completely encompasses the proposed Clovis Broadcasters' 15 mv/m contour. Even more of the proposed Clovis Broadcasters' 25 mv/m contour would be encompassed by station KGO's 0.5 mv/m contour.

CONCLUSIONS

1. The Clovis Broadcasters' proposal will provide 2.0 mv/m or greater service to five cities or communities having populations in excess of 2,500 persons. Each of those cities presently receives 2.0 mv/m or greater service from at least five other standard broadcast stations. The area within the 0.5 mv/m contour of the proposal is 7,025.5 square miles with 444,283 persons residing therein. The areas and populations receiving primary service from the Clovis Broadcasters' proposal presently receives aural service from a minimum of four and a maximum of at least twelve broadcast stations.

2. The proposed station will receive co-channel interference from station KABC, Los Angeles, California affecting 18,270 persons in an area of 367.4 square miles. All of the area and population subject to such interference presently receives primary service from a minimum of five other broadcast stations.

3. The Clovis Broadcasters' proposal will cause second-adjacent channel interference to station KGO, San Francisco, California, affecting only 3,039 persons in an area of 103 square miles. All of the area and population subject to such interference presently receives service from at least seven other standard broadcast stations, and thus are well served.

4. The interference which will be received by Clovis Broadcasters' proposed station affects only 18,270 persons out of a total population within the normally-protected 0.5 mv/m contour of 444,283 persons. The area of such interference is a mere 367.4 square miles out of 7,025.5 square miles encompassed within the 0.5 mv/m contour. Thus, only 4.1% of the population and 5.2% of the area within its normally-protected primary service area will be subject to such co-channel electrical interference, well under the 10% limitation.

5. Although the proposed location of Clovis Broadcasters' station is outside a 500-mile extension of the 0.5 mv/m 50% contour of station WBAP, good cause exists for a waiver of Section 1.569(b)(2)(i) of the Rules. The reason for the requirement imposed by that Section is to allow operation on the same frequency as WBAP of a hypothetical Class II–A station located at the proposed transmitter site. Because station KGO, San Francisco, California operates on the frequency 810 kHz, or 10 kHz removed from the WBAP frequency, and its 0.5 mv/m contour almost completely encompasses the proposed 15 mv/m contour of Clovis Broadcasters, the existence of station KGO on 810 kHz will preclude any possible future assignment on 820 kHz in the Clovis area. Thus, the hypothetical Class II–A station contemplated by the Rule is already precluded. The Clovis Broadcasters' proposal will not add to that preclusion.

6. Further, the Commission has consistently held in recent years that the effect of a proposal 30 kHz removed, such as is the case here, from the hypothetical Class II–A station which is to be protected under Section 1.569 of the Rules is almost immaterial. In *Blue Ridge Broadcasting Co., Inc.*, 23 RR 2d 887, 890 (1972); *Communications Associates, Inc.*, 25 F.C.C. 2d 515 (1970); and *Peter L. Pratt*, 16 F.C.C. 2d 967 (1969), the Commission noted that the 30 kHz separation was justification for a waiver of the Rules. Here, too, there is a 30 kHz separation.

7. In light of what appears to be a diminishing concern on the part of the Commission about proposals 30 kHz removed from a hypothetical Class II–A station, as demonstrated by the cited recent cases, it is concluded that good cause has been shown to justify a waiver of Section 1.569(b)(2)(i). Further, there is no reason for the protection contemplated in view of the fact that such a station is already totally precluded by the existence of another station in the area.

8. The Commission has already determined that the applicant is, except for the matters at issue in this proceeding, legally, financially, technically and otherwise qualified to construct and operate a standard broadcast station at Clovis, California. The issues here are resolved favorably to the applicant.

Accordingly, IT IS ORDERED that unless an appeal is taken from this Initial Decision to the Commission by a party or the Commission reviews this Decision on its own motion in accordance with Section 1.276 of its Rules, the application of Clovis Broadcasters for a permit to construct a new standard broadcast station at Clovis, California IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
LENORE G. EHRIG, *Administrative Law Judge.*

F.C.C. 73R-291

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of
COLORADO WEST BROADCASTING, INC., GLENWOOD SPRINGS, COLO.
GLENWOOD BROADCASTING, INC., GLENWOOD SPRINGS, COLO.
For Construction Permits

Docket No. 19588
File No. BPH-7646
Docket No. 19589
File No. BPH-7707

MEMORANDUM OPINION AND ORDER

(Adopted August 13, 1973; Released August 16, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING.

1. This proceeding involves the mutually-exclusive applications of Colorado West Broadcasting, Inc. (Colorado West) and Glenwood Broadcasting, Inc. (Glenwood) for authorization to construct a new FM broadcast station at Glenwood Springs, Colorado. The applications were designated for hearing by Commission Order, FCC 72-836, released September 22, 1972 (37 FR 20276). Now before the Review Board is a petition to enlarge issues, filed May 31, 1973, by Glenwood,[1] requesting the addition of the following issues against Colorado West:

> a. To determine whether Colorado West's 45% stockholder and director, Mr. William R. Dunaway, knowingly and willfully aided and abetted the operation of an illegal and unlicensed television translator station by providing the translator with a "tap" of the signal of television station KOA-TV, Denver, Colorado, in violation of Section 74.731(b) of the Commission's Rules.
>
> b. To determine with respect to Colorado West's president, 10% stockholder and proposed general manager, Mr. Glen Allen Lee Bell, whether Mr. Bell knowingly aided and abetted the operation of an illegal and unlicensed television translator station by continuously maintaining a microwave system which he knew was being utilized to aid an illegal broadcast operation.
>
> c. To determine with respect to Mr. Dunaway and Mr. Bell, principals of Colorado West, the effect on their absolute or comparative qualifications stemming from their knowledge of the illegal translator operation.
>
> d. To determine, on the basis of the evidence adduced pursuant to issues (1), (2) and (3), whether Colorado West possesses the requisite basic and/or comparative qualifications to be a broadcast licensee.

2. Glenwood alleges that two of Colorado West's principals, William R. Dunaway, a director and 45% stockholder, and Glen Allen Lee Bell, the president, 10% stockholder and proposed general manager, were involved in the operation of an unlicensed television translator station, and that the effect of this activity on Colorado West's qualifications should be fully explored in hearing. Specifically, Glenwood alleges that Dunaway was the manager of Canyon Cable TV[2] from 1962 through

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[1] Also before the Board are: (a) opposition, filed June 27, 1973, by Colorado West; (b) opposition, filed June 27, 1973, by the Broadcast Bureau; (c) reply, filed July 10, 1973, by Glenwood; and (d) letter, filed July 20, 1973, by Colorado West.

[2] Canyon Cable TV operates cable systems in Aspen and Rifle, Colorado.

May 2, 1973; that the only signal which the Aspen system received off the air was that of KREX-TV, Grand Junction, Colorado; and that the system received the remainder of its signals by microwave[3] which supplied the signals of four Denver television stations including KOA-TV. According to Glenwood, the microwave system and the Aspen CATV system were located in a structure owned and occupied by translator equipment belonging to the Aspen TV Committee; the translator (KOGAF) was licensed to translate only the signal of KREX-TV, Channel 5, in Grand Junction onto Channel 6 in Aspen: and there is no record of any license, application or authorization for a translator in Aspen to rebroadcast the signal of any Denver television station. Glenwood further alleges that Bell was employed by Western Telecommunications as a microwave technician from the summer of 1970 until March 7, 1972; that Bell's duties included servicing the microwave system serving the Aspen Cable system; and that during the time when Dunaway was managing the cable system and Bell was servicing the microwave system, the translator located in the same building was illegally broadcasting the signal of KOA-TV, Denver. Glenwood further states that Bell testified at the May 15, 1973, hearing that he heard talk regarding an illegal translator in Aspen but was instructed by his superiors not to touch either the cable or the translator equipment while working in the building shared by the three systems. Glenwood argues that the KOA-TV signal was obtained from either a CATV headend or a microwave system in violation of Section 74.731(b) of the Commission's Rules[4] and that Bell must have had knowledge of or complicity in the operation of the illegal translator since he and Dunaway are business partners in the Colorado West venture.

3. Both Colorado West and the Bureau oppose the requested issues on the ground that the allegations raised by Glenwood are based on hearsay and do not satisfy the requirements of Section 1.229(c) of the Commission's Rules that motions to enlarge issues contain specific allegations of fact and be supported by affidavits of persons having personal knowledge thereof. Colorado West also argues that there are no facts which indicate that any ownership or other interest in the translator facility is attributable to Colorado West or its principals. The Bureau argues that Glenwood has not established that Dunaway or Bell had knowledge of an illegal translator other than the fact that Bell worked in the same building and the CATV system managed by Dunaway was located in the same building as the alleged illegal translator. In its reply, Glenwood submits an unsworn statement signed by Michael J. Garrish of Aspen, Colorado. Garrish, a member of the Aspen TV Committee, states that "about six to eight years ago" the Committee agreed to let Dunaway install his cable equipment in its building provided that Dunaway would maintain the Committee's

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[3] The microwave system (Station KC093) was licensed to Mountain Microwave Corporation (Western Telecommunications, Inc.).

[4] Section 74.731(b) of the Commission's Rules provides as follows:

> Except as provided in paragraph (f) of this section, a television broadcast translator station, may be used only for the purpose of retransmitting the signals of the television broadcast station, another television broadcast translator station, or a television translator relay station, which have been received directly through space, converted to a different channel by simple heterodyne frequency conversion, and suitably amplified.

equipment. Later, according to Garrish, the Committee agreed to permit Dunaway to use its KREX–TV signal on his CATV system and requested that Dunaway provide them with the KOA–TV signal. Garrish states that the KREX–TV signal later appeared on the Aspen cable system and the KOA–TV signal appeared on the Aspen TV translator system. Glenwood also submits the affidavits of Jack Warkentin and Joan Warkentin, both Glenwood principals, who state that from the time they moved to Aspen, on August 15, 1970, to May 2, 1973, they received KOA–TV, Channel 4 in Denver, on Channel 11 in Aspen.[5]

4. The Review Board will deny the requested issues. Glenwood's petition is fatally defective because it is not supported by an affidavit of a person with personal knowledge of the facts and, therefore, does not comply with Section 1.229(c) of the Commission's Rules. See *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 475, 21 RR 2d 1147, 1150 (1971); *Pleasant Broadcasting Co.*, 22 FCC 2d 191, 194, 18 RR 2d 689, 692 (1970). *Cf. Bay Shore Broadcasting Co.*, FCC 63R–61, 24 RR 988. Consequently, we cannot fault Colorado West for refusing to respond to a defective petition. The burden is on the petitioner to comply with the requirements of Section 1.229. Thus, "it was [Glenwood's] obligation as a petitioner to allege sufficient facts to raise a substantial question. . . ." *Phil D. Jackson*, 33 FCC 2d 928, 932, 23 RR 2d 1023, 1028 (1972). The Garrish statement (see paragraph 3, *supra*) was improperly submitted with the reply pleading and is not an affidavit, but merely a signed statement, witnessed by a Deputy Clerk, and, as such, does not comply with Rule 1.229(c). In addition, Glenwood does not explain why the affidavits of the Warkentins, both Glenwood principals, could not have been submitted with its petition rather than its reply.[6] Moreover, even assuming, *arguendo*, that the statement and affidavits attached to Glenwood's reply meet the procedural requirements of Rule 1.229(c), the petition is still fatally defective since a petitioner is not permitted to cure an otherwise defective petition by means of a reply pleading where, as here, the petitioner has not adequately explained why the information could not have been contained in the original petition. See *Industrial Business Corp.*, 40 FCC 2d 69, 26 RR 2d 1447 (1973). Finally, the Board does not believe that Bell's testimony at the May 15, 1973, hearing raises any question concerning Bell's knowledge of or complicity in the operation of the allegedly illegal translator operation. In our view, his testimony does not support the inference, as argued by Glenwood, that Bell must have had knowledge of the unlicensed translator since he and Dunaway were partners in the Colorado West venture.

5. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed May 31, 1973, by Glenwood Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[5] According to Glenwood, the Warkentins were not subscribers to the Aspen cable system.

[6] We note that these affidavits do not relate to Dunaway's or Bell's alleged participation in the operation of the alleged unlicensed translator, but rather state that the signal of KOA–TV, Denver, appeared on Channel 11 in Aspen without the assistance of the Aspen cable system. The affidavits clearly do not support Glenwood's requested issues.

F.C.C. 73-825

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
COMCAST CORP., PHILADELPHIA, PA.

GREATER PHILADELPHIA CABLE TV, INC.,
PHILADELPHIA, PA.
For Certificates of Compliance

CAC-1242
PA023
CAC-1257
PA169

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 16, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT; COMMISSIONER HOOKS CONCURRING IN PART AND DISSENTING IN PART.

1. Two Philadelphia, Pennsylvania, community organizations, the Communications Workshop of the Human Services Cooperative and the Philadelphia Cable Coalition, have filed petitions requesting reconsideration of the Commission's grant of certificates of compliance to Comcast Corporation and Greater Philadelphia Cable TV, Inc., proposed operators of cable television systems at Philadelphia. These certificates were granted by the Chief, Cable Television Bureau, pursuant to authority delegated to him by the Commission,[1] after a determination that each application was unopposed, that the proposed service was consistent with the rules, and that each applicant had submitted a cable television franchise which substantially complies with Section 76.31 of the Commission's Rules.

2. In its petition, the Communications Workshop argues that: (a) Comcast's construction plans have not been subjected to public proceedings as required by Section 76.31(a)(1) of the Rules; (b) the franchise can be renewed without specifying a term of years, contrary to Section 76.31(a)(3); (c) no schedule of fees is specified by the franchise; (d) while the application states that a twenty channel system will be constructed, the Workshop has learned that the system will have a 30-40 channel capacity; and (e) local newspapers originally obtained Philadelphia cable franchises, and have since failed to inform the public adequately about cable television. Accordingly, the Commission should order additional public hearings about cable television in the franchise area.

3. The Philadelphia Cable Coalition submits many of the same arguments: (a) there have been no public hearings regarding the applicant's construction plans since 1965-1966; (b) there is no specified

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[1] Section 0.289(c)(12) of the Rules delegates to the Chief, Cable Television Bureau, the authority:

> to act on applications for certificates of compliance which conform to applicable rules and regulations, and are either unopposed or whose disposition is governed by established Commission policy.

franchise term if the franchise should be renewed; (c) the franchise does not specify initial subscriber rates; (d) the franchise fee exceeds 3% but no justification has been supplied as required by Section 76.31(b) of the Rules; (e) the proposed twenty channel capacity systems will not adequately serve large urban areas; (f) the Commission's reliance upon substantial compliance of these franchises with Section 76.31 of the Rules will only serve to implement outdated and defective franchises; and (g) there is no assurance that the poorer sections of the city will be wired.

4. In opposing reconsideration, Comcast and Greater Philadelphia assert that both petitions are procedurally defective because the standing and pleading requirements of Section 1.106(b) of the Rules have not been satisfied [2] (neither petitioner participated in the earlier stages of the certification proceedings, and no explanation for this absence was submitted). Further, the applicants argue that the petitioners failed to state with particularity the manner in which they were aggrieved by the Commission's actions, and that their declared interest was merely a "broad-based allegation based on a self-proclaimed interpretation of the public interest." Moreover, the applicants contend that no new facts have been submitted which require reconsideration of our earlier action since their franchises substantially comply with Section 76.31, and to satisfy the petitioners' complaints about them would involve a rejection of the criteria enunciated in *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10. Additionally, it is argued, the applicants must in any case return to the City of Philadelphia to correct these noted deficiencies before the expiration of present certification (December 12, 1976). Furthermore, although both applications indicate that a twenty channel system will be constructed, final capacity may exceed this number. A twenty channel system is specified because the Commission's rules require that applications for major market systems indicate that at least a twenty channel system will be installed. The applicants believe the objection to newspaper ownership of cable systems derives in part from a fear of media-concentration but it is pointed out that the Commission's cross-ownership rules do not apply to newspapers,[3] and that in any case there is no newspaper ownership involved here. Finally, the applicants underscore their commitment to serve all sections of their franchise areas.

5. In its reply, PCC ascribes its failure to participate in the earlier consideration of these applications to an inadequate notice that these applications were pending before the Commission. No reply was submitted by the Workshop. Our decision turns on the uncontradicted fact that these applicants adhered to the notification requirements of Sec-

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[2] Section 1.106 (b) of the Rules provides that:

> Except where the Commission has denied an application for review without specifying reasons therefor, any party to the proceeding, or any other person aggrieved or whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is field by a person who is not a party to the proceeding, it shall state with particularly the manner in which he is aggrieved or his interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

[3] Section 76.501 of the Rules.

tion 76.13(a) of the Rules,[4] and that we gave public notice of the filing of these applications. As a consequence, we view PCC's justification for its earlier absence as an inadequate response to the requirements of Section 1.106(b) of the Rules. Since the Workshop did not address these matters at all, no similar exercise of judgment is necessary. Therefore, on procedural grounds alone, both petitions are defective and could be rejected. Nonetheless, we have examined the merits to determine whether the public interest would be served if reconsideration were granted and our earlier action set aside. We have concluded that reconsideration is not justified in these cases.

6. The cable television franchises held by Comcast and Greater Philadelphia do not fully comply with Section 76.31 of the Rules; however, there is no requirement that they presently do so. As we stated in *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, at 366:

> Franchises granted prior to March 31, 1972, will be processed even though they do not meet all the requirements of our new rules so long as there is substantial compliance.

Thereafter, in *CATV of Rockford, Inc.*, FCC 72–10005, 38 FCC 2d 10, we determined that the term "substantial compliance" would be given a liberal construction in order to avoid unreasonable hardship and delays. Otherwise, few if any franchises awarded before March 31, 1972, would meet the standards of our new franchise guidelines. In reviewing these older franchises for substantial compliance with our new guidelines, we must judge them on the basis of all of their provisions; the fact that one or more provisions fails to satisfy Section 76.31 does not necessarily invalidate the entire franchise, except in those instances where the particulars of a franchise are flagrantly violative of Section 76.31 of the Rules. Having said this, we shall now review the specific arguments of petitioners.

7. The Philadelphia City Council has apparently conducted no public hearings respecting these franchises since December 13, 1966. Although we assume that the applicants' construction plans have not been publicly examined since the franchises were awarded, they have pledged themselves to adhere to the policy of Section 76.31(a)(2) of the Rules by constructing 20 percent of their franchised area within one year of Commission certification. Further, we are assured that these systems will be completed in four years and that all sections of the community will be served. In the same vein, the applicants assured us that, despite the silence of the franchises respecting subscriber rates, "only such rates as are just and reasonable under the circumstances and in accord with industry practice in Philadelphia and the

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[4] Pursuant to Sections 76.13(a) (6) and (7), an applicant must submit, with the application,

(6) An affidavit of service of the information described in subparagraph (1) of this paragraph on the licensee or permittee of any television broadcast station within whose predicted Grade B contour or specified zone the community of the system is located, in whole or in part, the licensee or permittee of any 100 watt or higher power television translator station licensed to the community of the system, and any local or state educational television authorities;

(7) A statement that a copy of the complete application has been served on the franchising authority, and that if such application is not made available for public inspection by the franchising authority, the applicant will provide for public inspection of the application at any accessible place (such as a public library, public registry for documents, or any attorney's office) in the community of the system at any time during regular business hours.

Philadelphia area and the revenue requirements of the system" will be charged. Thereafter, a schedule of rates was filed with the Commission by Greater Philadelphia Cable TV.[5] We have accepted similar commitments from applicants whose franchises failed to comply with other requirements of Section 76.31 of the Rules yet warranted processing under the criteria established in the note following Section 76.13 (a) (4) of the Rules, and developed in *CATV of Rockford*, *supra*, and the cases which followed.[6] Both petitioners fear that, at the expiration of the initial ten-year term, the applicants can renew the franchises for an indefinite number of years. Such fears are groundless since our certification extends only until December 12, 1976. Before certification will be renewed, the applicants must submit to us franchises that comply with Section 76.31, including the provision requiring a reasonable term of renewal (Section 76.31(a)(3)). Finally, the petitioners argue that the annual franchise fee exceeds three percent and no justification therefore has been submitted. Again, in several instances, we have certified applications when the franchise required an annual fee in excess of three percent on the basis of the franchise's substantial compliance with Section 76.31 of our Rules.[7] The grant of certificates of compliance, valid only until December 12, 1976, will require both applicants to file franchises with the Commission which fully comply with our rules. Consequently, the defects noted by the petitioners must be corrected if the Commission's certification is to be renewed, unless good cause for further variance is convincingly demonstrated at that time.

In view of the foregoing, the Commission finds that reconsideration of the grants of certificates of compliance to Comcast Corporation (CAC–1242) and Greater Philadelphia Cable TV, Inc. (CAC–1257) would not be consistent with the public interest.

Accordingly, IT IS ORDERED That, the petition for reconsideration filed February 16, 1973, by the Communications Workshop of the Human Services Cooperative against the application for a certificate of compliance of Comcast Corporation (CAC–1242) IS DENIED.

IT IS FURTHER ORDERED, That the petition for reconsideration, filed February 22, 1973, by the Philadelphia Cable Coalition against the application for a certificate of compliance of Comcast Corporation IS DENIED.

IT IS FURTHER ORDERED, That the petition for reconsideration filed February 22, 1973, by the Philadelphia Cable Coalition against the application for a certificate of compliance of Greater Philadelphia Cable TV, Inc. (CAC–1257), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[5] This system will charge the following rates:

Installation charge	$10.00
Basic Monthly charge	6.00
Second Outlet	2.00

[6] E.g., *Sand Springs Cable Television*, FCC 72–1104, 38 FCC 2d 581; *Fox Communications, Inc.*, FCC 72–1107, 38 FCC 2d 536; *Cable Telesystems of New Jersey*, FCC 73–147, 39 FCC 2d 547; *Tri-County Cable Television, Inc.*, FCC 73–189, FCC 39 2d 833.

[7] See *Tulsa Cable Television*, FCC 72–1011, 38 FCC 2d 83.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
COMMUNITY COALITION FOR MEDIA CHANGE
For Financial Data of Station KDIA,
Oakland, Calif.

AUGUST 20, 1973.

MR. MARCUS GARVEY WILCHER, *Director, Community Coalition for Media Change, Berkeley, Calif.*

DEAR MR. WILCHER: In response to your letter of April 3, 1973, we have carefully considered your request for inspection of the financial data contained in the annual financial reports (FCC Forms 324) filed with the Commission during the last three years by radio station KDIA, Oakland, California. It is my view, as explained below, that your request for these non-public financial reports should be denied. Counsel for the licensee in this matter has been advised of your request and has indicated that the station is opposed to making its reports available to you.

As you may be aware, the Commission's rules require a broadcast licensee to submit yearly financial reports (FCC Forms 324) to the Commission and this information is provided to the Commission upon the assurance of confidentiality. Section 0.457(d)(1)(i) of the Rules, 47 CFR § 0.457(d)(1)(i), classifies these annual reports as "records not routinely available for public inspection." Section 0.461 of the rules, however, also contains procedures for requesting access to these reports and provides that a request for inspection may be granted if the Commission determines in light of the considerations favoring disclosure and non-disclosure, that disclosure would serve the public interest. It should also be noted that the Commission has the discretion to withhold this information from mandatory public inspection pursuant to exemption 4 of the Freedom of Information Act for matters that are "trade secrets and commercial or financial information obtained from any person and privileged or confidential," 5 U.S.C. § 552 (b)(4). Although this statutory provision in general requires the disclosure of government records, it also contains exemptions from its mandatory disclosure requirements, and exemption 4 thereof would clearly be applicable to the type of financial information you have requested.

Your letter indicates that this information is being sought because your group believes the licensee to be deficient in providing minority programming and because you have been advised by the station that it lacks the necessary financial resources for such items as a public affairs budget. You also note, that "KDIA has said that it, more than any other Bay area station, serves the Black community."

Although the Commission has recognized that there can be instances when disclosure of the financial reports of broadcast licensees is appropriate, disclosure has usually been limited to a Commission proceeding in which the licensee whose financial records were requested has sought to reply upon them to prove its case. In such a situation, the Commission has indicated that basic fairness requires such data to be made available to other parties in the proceeding.[1] In regard to the instant request, our records do not show any pending Commission proceeding involving Station KDIA. Nor have you indicated that the information sought would be material or relevant to the issues in such a Commission proceeding. Thus I believe it clear that there is no basis for granting your request at this time. In accordance with the procedures for review set forth in Section 0.461(d)(2), you may wish to file an application with the Commission for review of this determination.

Sincerely yours,

JOHN M. TORBET,
Executive Director.

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[1] See, for example, the prior Commission decision, In the Matter of Request by Citizens Communications Center for Inspection of Annual Financial Reports, 37 F.C.C. 2d 32, *aff'd*, 38 F.C.C. 2d 289, 39 F.C.C. 2d 876, in which the request for the annual financial reports was granted. See also Alianza Federal de Pueblos Libres, 31 F.C.C. 2d 557 (1971) denying the request for the financial reports. (The denial was subsequently upheld by the U.S. Court of Appeals for the District of Columbia.) Also see Alianza Federal de Pueblos Libres, 40 F.C.C. 2d 485 (1973) denying the request for the financial reports.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ACCURACY IN MEDIA, INC., WASHINGTON, D.C.
Concerning Fairness Doctrine Re Station WNBC, New York, N.Y.

AUGUST 16, 1973.

ACCURACY IN MEDIA, INC.,
1232 Pennsylvania Building,
425 13th Street NW.,
Washington, D.C.

GENTLEMEN: This is in response to your letter of complaint, dated March 4, 1973, concerning an interview with Mr. Alger Hiss which was broadcast on Radio Station WNBC, New York, New York, on December 13, 1972 from 10:30 p.m. to midnight.

You state that Mr. Hiss appeared on a program conducted by Mr. Alan Douglas which normally includes telephone questions from listeners, but "In deference to Mr. Hiss, no telephone calls with questions were accepted during his appearance." You state that "the interview dealt with controversial issues of public importance in a one-sided, unbalanced manner" and constituted "a violation of the requirements of the fairness doctrine." Specifically, you state that Mr. Hiss' statements "were centered around the controversial contention . . . that he was never a member of the Communist Party, that he was never a spy for the U.S.S.R. and that he was unjustly and wrongfully convicted of perjury for denying these charges under oath," and also touched upon "several subsidiary controversial issues, such as the contention by Mr. Hiss that the case against him was cooked up for political reasons and that he was picked as a victim in order to embarrass the Truman administration." You also state that "this appearance was part of Mr. Hiss' effort to promote his book . . .. an effort by Mr. Hiss to convince the public of his innocence and to show that his conviction was a miscarriage of justice." You submit that "There can be no doubt that the general and specific contentions made by Mr. Hiss about his case are highly controversial." and that although "Time may have dulled memories and reduced interest in the case, . . . no new evidence has been produced in the last twenty years that has made the case against Hiss any less convincing." You also state that the program in question allowed Mr. Hiss an opportunity to present "his version of the facts without contradiction from the host or anyone else." and that no "difficult questions" or "embarrassing facts" which might have "cast doubt on Mr. Hiss' veracity" were presented.

You further state that on January 25, 1973, you wrote to Station WNBC asserting your judgment that the Hiss interview dealt with controversial issues of public importance in a one-sided way and raised fairness doctrine obligations. The copy of that letter which you have submitted also indicates that you advised the station that you had been informed by the program producer that no other program dealing with the Hiss case had been presented and none was planned for the future, and that you requested either confirmation of this statement or assurance that a future program discussing the case "from a more disinterested point of view" would be presented. You have also submitted a copy of the station's response to you, dated February 16, 1973, which states that "The incidents and events which were discussed on this program occurred more than twenty years ago"; that "In NBC's judgment, while the program was of historical interest, it did not involve the discussion of any current controversial issue of public importance"; and that "The mere fact that this interview had news value does not mean that it concerned a controversial issue of public importance to which the fairness doctrine applies."

In reply to this response, you state that the above information indicates that "the Hiss case remains highly controversial," and that the remaining question is "whether or not it is one of public importance." You submit that the case is still a matter of great public importance since Mr. Hiss' statements "cannot be accepted without casting serious doubt upon our system of justice, the fairness of Congressional investigations and their worth, the judgment and integrity of the man who now holds the post of President of the United States, Richard Nixon, and on the character of a number of other individuals involved in the case, many of whom are still living." In support of this contention, you cite the views of Mr. Herbert A. Philbrick, "an expert on the Communist Party," which argue that "the rehabilitation and vindication of Alger Hiss is an important objective of the Communist Party today"; that "if the public can be convinced that Hiss was innocent, not only will confidence in the fairness of the American judicial system be undermined, but it will be easier to argue that the penetration of the government by Communist agents in the past was just a myth"; and that "this will be useful to the Communist Party in its unrelenting campaign to abolish the House Internal Security Committee, the Senate Internal Security Subcommittee and to dismantle security safeguards in the Federal Government." You conclude that "it is clear that the controversial question of the guilt of Alger Hiss is an issue of very great public importance today," and submit that "WNBC should be ordered to comply with the fairness doctrine . . ."

The general question raised by your complaint is whether WNBC's broadcast of the interview with Mr. Hiss presented a discussion of one side of a controversial issue of public importance and thereby obligated its licensee under the fairness doctrine to afford an opportunity for the presentation of contrasting views. As has been frequently observed, "[to] invoke the fairness doctrine . . . there must exist a controversial issue of public importance on which the licensee has refused to allow a reasonably balanced point of view." *Green* v. *FCC*, 447 F 2d 323, 327 (D.C. Cir. 1971); quoted with approval in *Healey* v. *FCC*, 460 F. 2d 917, at 920 (D.C. Cir. 1972). The Commission has long held in this regard that it is both the responsibility and within the discretion of the licensee to determine whether a controversial issue of public importance has been presented in its programming and that the burden is on the complainant to establish that the licensee's judgment in such matters is unreasonable or lacking in good faith. See *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964); *Report on Editorializing*, 13 FCC 1246 (1949).

With these principles in mind, the specific issue on the facts presented here is the reasonableness of NBC's judgment that the matters discussed by Mr. Hiss in the interview in question did not raise any controversial issue of public importance within the meaning of the fairness doctrine. First, it must be noted that the events and circumstances surrounding Mr. Hiss' prosecution and conviction for perjury occurred over twenty years ago.[1] Thus, it would not appear unreasonable for NBC to conclude that the Hiss case is not now the subject of any controversy of public importance and that argument and contentions concerning its facts and details present matters which are newsworthy only in terms of their historical interest. As the Court of Appeals has observed:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues. *Healey* v. *FCC*, supra, at 922.

In challenging the reasonableness of the licensee's judgment that the interview with Mr. Hiss did not present or discuss a controversial issue of public importance, you submit that "no new evidence has been produced in the last twenty years that has made the case against Hiss any less convincing," and that although Mr. Hiss insisted on his innocence in the interview, "there is still a great deal of evidence that indicates that he perjured himself before the grand jury and that his word is no better now than it was then." Although you thus dispute the veracity of Mr. Hiss' statements of fact and protestations of innocence regarding the case, you have not provided the Commission with any information indicating that the particulars of Mr. Hiss' association with the Communist Party and relationship with the Soviet Union, or the matter of his guilt or innocence of the charge of perjury and the circumstances surrounding his prosecution and conviction for that offense, presently constitute an important controversial public issue.

You also more broadly contend that Mr. Hiss' statement of his version of these past matters is of controversial public importance because it "cannot be accepted without casting serious doubt upon" the American system of justice, the fairness and worth of Congressional investigations, and the judgment, character, and integrity of individuals involved in the case, including the present President of the United States. However, you have not submitted any information to indicate that Mr. Hiss' actual broadcast statements were critical of or even addressed to any present-day standards or procedures of justice or the current fairness and worth of Congressional investigations, nor have you shown that such remarks called into question or were otherwise directed at the judgment, character or integrity of any identified contemporary person or group. Thus, from the information set out in your complaint, it would appear that Mr. Hiss' statements were wholly concerned with matters and events dated some twenty years ago and can be related to possible subjects of present controversy and public importance only by indirect implication and inference. As the Commission has stated:

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[1] See *United States* v. *Hiss*, 185 F. 2d 822 (2d Cir. 1950), *cert. denied* 340 U.S. 948 (1951); *United States* v. *Hiss*, 107 F. Supp. 128 (S.D.N.Y. 1952), *aff'd mem.*, 201 F. 2d 372 (2d Cir. 1953).

> Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or *inference from statements or presentations*, could be made the subject of a separate and distinct fairness doctrine requirements, the doctrine would be unworkable. More important, . . . such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism. We would become an integral part of broadcast journalism, passing on thousands of complaints that some statements, or *inference to be drawn from a statement*, on a newscast or other news show had not been offset by countering presentation. *National Broadcasting Co.* (*AOPA complaint*), 25 FCC 2d 735 (1970) (Emphasis added).

In conclusion, we wish to emphasize that the question properly presented here is not the truth or falsity of Mr. Hiss' statements or the credibility of his version of the facts, circumstances and disposition of his case, but rather the reasonableness of the licensee's judgment that the interview with Mr. Hiss did not raise any controversial issue of public importance within the meaning of the fairness doctrine. On the basis of the information which you have provided and for the foregoing reasons, the Bureau is unable to conclude that the licensee's judgment in this matter is unreasonable, or lacking in good faith. Accordingly, no further Commission action appears warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HENRY M. BUCHANAN, WASHINGTON, D.C.
Concerning Fairness Doctrine Re Columbia Broadcasting System

AUGUST 17, 1973.

Mr. HENRY M. BUCHANAN,
c/o Glaser & Fletcher, P.C.,
1150 17th Street NW.,
Washington, D.C.

DEAR MR. BUCHANAN: This refers to your complaint of May 11, 1973, that the CBS Television Network has violated the fairness doctrine with reference to the following news report broadcast on the "CBS Evening News" on May 8, 1973:[1]

> Good evening. When the Watergate scandal began to break, one of the first disclosures involved the so-called laundering of campaign contributions. That is sending the contributions through a bank or banks, in this instance Mexican, thus making it difficult to trace the donor. Well, it now seems that all that long distance travel was unnecessary. There apparently was a laundry down the street, so to speak. Court records disclosed today that the Nixon campaign used a Bethesda, Maryland accounting firm to convert contribution checks into cash before being turned over to the campaign. The Bethesda firm, by the way, is headed by Henry Buchanan whose brother Patrick is a Presidential speechwriter and advisor.

On the "CBS Evening News" of May 11, 1973, you state that the following statement was broadcast:

> Three nights ago this broadcast reported erroneously, it turned out, that the Nixon campaign had used a Bethesda, Maryland, accountant to launder campaign contributions into cash. CBS News regrets the error. We have now learned that the accountant was not handling contribution checks, but checks issued by the Finance Committee to Re-Elect the President. The accountant, Henry Buchanan, who is a brother of Presidential aide, Pat Buchanan, would deposit the Committee's checks in his client account and then issue cash back to the Committee or issue checks to whomever the Committee specified. Questioned by CBS News

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[1] Also before the Commission are your Amendment to the Complaint, filed on May 21, 1973, containing a copy of your letter to CBS dated May 21; CBS's reply of June 14 to your May 21 letter; and your June 19 letter to the Commission requesting a ruling on the matter.

> the Nixon campaign staff would not comment on the procedure or on how much money was involved pending the opening by a Federal District Court in Washington of Henry Buchanan's sealed deposition.

In your complaint, as amended, you contend that the May 8 broadcast constituted a "false and malicious personal attack upon the integrity of Mr. Buchanan, his professional reputation and the reputation of his accounting firm," and accused you of a felony (violation of 2 U.S.C. Section 432(b) 1970). You claim that the May 8th broadcast constituted "a personal attack upon the integrity, honesty and character of Mr. Buchanan." However, you note that since the May 8th statement occurred within the context of a "bona fide newscast," that "it would appear exempted from the so-called personal attack rules by operation of Section 73.679(b)(3)"; yet, you add that it "comes dangerously close to falling outside of the protected area of *bona fide* newscasts, which rightfully, are exempted to encourage free and full reporting of the news."

Additionally, you assert that the May 8th news item was "maliciously defamatory" and "clearly subject to the Commission's fairness doctrine." You allege that the controversial issue of public importance is "your alleged association with 'the Watergate scandal' " and that CBS "failed to present a fair and impartial account of the court proceeding which formed the basis of the news report." You claim that the fairness doctrine requires full retraction; namely, you request CBS to correct the impression that "Buchanan was guilty of criminal conduct . . . or was in any way involved in the Watergate Affair" and also to apologize "for this defamation." You argue that the comment, "CBS News regrets the error," made as part of the May 11th retraction, did not specifically enough disassociate you from "Watergate."

You also claim that the "utter disregard for factual reporting and the use of defamatory innuendo and unsupported implication evidence a purposeful bias and distortion of a news story." In support of the claim you state that CBS was the only network to carry the news item and secondly, that "CBS, more than the other networks, has been the subject of frequent criticism for liberal and anti-Administration news bias." You seek "close scrutiny by the Commission and full explanation by CBS," and the Commission to "require CBS to submit a full explanation of its views on this matter."

In response to your complaint, CBS stated that "CBS News has acted consistently with the requirements of both the fairness doctrine and good journalistic practice."

As you recognize, Section 73.123(b)(3) of the Commission's Rules and Regulations exempts from the Commission's personal attack rules "bona fide newscasts." The "CBS Evening News" clearly comes within this category, and there is therefore no issue presented of violation of this rule.

You also contend that CBS has violated the fairness doctrine with respect to the issue of your "alleged association with 'the Watergate scandal.' " If a licensee, or a network, presents one side of a controversial issue of public importance, it is required by the fairness doctrine to afford reasonable opportunity for the presentation of contrasting views. You have not contended that CBS has not complied with the requirements of the fairness doctrine with respect to the issue which has come to be known as "Watergate." Rather, you appear to urge that the association of your name with this controversial issue of public importance raises a separately cognizable issue. However, mention of a specific person or group does not itself constitute a controversial issue of public importance unless that person or group is controversial. *Healey* v. *FCC*, 460 F. 2d 917 (1972). The fairness doctrine is thus "issue-oriented." A contrary approach would tend to convert a myriad of news items into discussions of controversial issues everytime an individual is mentioned. In view of your failure to make a showing of the specific grounds upon which CBS could have concluded that your alleged association with "the Watergate scandal" constituted a separate controversial issue of public importance, we are unable to find that CBS acted unreasonably. See *National Broadcasting Company* (AOPA Complaint), 25 FCC 2d 735 (1970). Moreover, even if we assume, *arguendo*, that a controversial issue of public importance was involved, we cannot find that CBS acted unreasonably or in bad faith in attempting to present opposing views. While CBS News reported on May 8, 1973 that "Court records disclosed today that the Nixon campaign used . . . (your firm) . . . to convert contribution checks into cash before being turned over to the campaign." three days later CBS News reported that it had erred, and that, "We have now learned that the accountant was not handling contribution checks . . ." Having thus raised the matter and three days later having reported their error, it cannot be said that CBS News failed to present contrasting views. The fact that CBS News did not present as much detail of the entire matter as you would have preferred does not present a basis for Commission action. The Commission has repeatedly stated its disinclination to substitute its own judgment as to the preparation of news for that of the licensee or network.

Finally, you charge "purposeful bias and distortion" by CBS in this matter. Unquestionably, deliberate distortion or slanting of news by licensees or networks would be patently inconsistent with the public interest. However, in order for the Commission appropriately to commence action in this sensitive area it must receive significant extrinsic evidence of such deliberate distortion as, for example, statements by individuals who have personal knowledge that a licensee ordered the news to be distorted or fabricated. *Letter to ABC*, 16 FCC 2d 650 (1969). The fact that CBS was the only network to carry the item and your opinion that CBS has been criticized for "liberal and anti-Administration news bias" cannot be found to constitute such "significant extrinsic evidence."

In view of the above, we conclude that further action by the Commission would not be warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINSBURG,
Acting Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
FEMALES OPPOSED TO EQUALITY, BATON ROUGE, LA.
Concerning Fairness Doctrine Re Station WBRZ-TV

AUGUST 17, 1973.

MRS. BABS MINHINNETTE,
National Chairman, Females Opposed to Equality, 10688 Ranchwood Drive, Baton Rouge, La.

DEAR MRS. MINHINNETTE: This is with reference to your July 22, 1973 complaint alleging that WBRZ-TV, Baton Rouge, Louisiana violated the fairness doctrine. You contend the broadcast of the "Helen Reddi" show presented one side of a controversial issue of public importance, "Women's Lib," and that licensee has failed to afford a reasonable opportunity for the presentation of contrasting views. You have requested licensee to "either get the 'Helen Reddi' show off the air or put me or someone else on the air who will present the other side . . ." The licensee denied your July 1 request for equal time stating that "we feel that the program is in good taste and meets all sensible criteria for standards of morality, taste, etc."

The selection and presentation of specific broadcast material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from sensoring broadcast material. In other words, the Commission is precluded by an Act of Congress from interfering with what material is broadcast by a licensee. In addition, there is no provision of the Constitution or of any statute or regulation guaranteeing to any particular person the use of the microphone for the presentation of broadcast material and, therefore, the broadcast licensee is under no obligation to have any person present his views.

As we pointed out in our letter to you of February 5, 1973, the fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy does not however, require that "equal time" be afforded for each side. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

Your present complaint principally consists of general assertions that the presentation of the "Helen Reddi" show presents one side of a controversial issue of public importance, "Women's Lib." However, you have provided the Commission with no information to indicate that there was any discussion of the issue, or even if it were discussed, that WBRZ, in its overall programming has not attempted to present contrasting views on the issue of "Women's Lib." Mere allegation without more does not meet the procedural requirements set forth by the Commission in *Allen C. Phelps*, 21 FCC 2d 21 (1970). As the Commission stated therein:

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary . . .

Therefore, the burden is upon the complainant to substantiate his conclusion that a station has been unreasonable in its coverage of an issue. Your reasons for concluding that only one side of the issue has been presented, that is, "that there is not any time given to air the other side," fails to comply in any respect to the type of information we require before we can make an appropriate judgment.

Therefore, based on the information you have submitted, it cannot be said that WBRZ–TV has violated the fairness doctrine or acted unreasonably or in bad faith with respect to its response to your July 1 request for equal time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINSBURG,
Acting Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ROBERT C. GREENE, WARRENSBURG, N.Y.
Concerning Fairness Doctrine Re Station
WGY, Schenectady, N.Y.

AUGUST 17, 1973.

MR. ROBERT C. GREENE,
Star Route,
Warrensburg, N.Y.

DEAR MR. GREENE: This will refer to your complant of July 5, 1973 against Radio Station WGY, Schenectady, New York, concerning alleged fairness doctrine violations.

You state that WGY broadcast a program on March 13, 1973 from 12:30 to 2:00 p.m. which concerned a discussion of cable television and in particular encouraged listeners to write their legislators if they wanted the recent Federal Communications Commission ruling, prohibiting cable television in the Schenectady area, overturned. You allege that WGY suppressed information of an alternative method to cable television, referred to as "TV translators", because the local broadcasters feared losing their viewing audience. You contend the translating method is capable of producing the same result as cable television. You requested WGY to afford you "equal time" to present your views on the translator system.

The licensee responded to your April 16, 1973 letter and denied your request stating that "After a thorough review of this matter, we do not believe that translators and cable television represent a controversial issue of public importance within our area of coverage."

In conjunction with a licensee's responsibility to select and present the programs broadcast over its facilities, it also has the responsibility to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. In this regard, if one side of a controversial issue of public importance is presented, the station is obligated under the fairness doctrine to afford reasonable opportunity for the presentation of contrasting views. However, this policy does not require "equal time" be afforded for each side. We note that your complaint of July 5 conceded that there was no controversy "per se" between cable television and television translators. WGY agreed and stated that although the FCC decision prohibiting cable television in the Schenectady area was not popular, "numerous points of view with respect to that decision had been presented on our station."

It appears that the March 13 program concerned a discussion of cable television and the FCC ruling pertaining to the Schenectady area, that during the program contrasting views on that issue were discussed, and that TV translators were not discussed. Therefore, in light of the fact that both you and WGY agree there is no controversy surrounding cable TV vis-a-vis TV translators, it cannot be said that WGY acted unreasonably or in bad faith in its decision that its discussion of cable television did not necessitate a discussion of TV translators. Cf. *National TV Translator Association*, 19 FCC 2d 918 (1969).

With respect to your allegation that WGY had deliberately suppressed the discussion of television translators, the Commission's policy in this area is set forth in its *Letter to Mrs. J. R. Paul*, 26 FCC 2d 591 (1969). We stated there that:

> The broadcaster is barred from keeping off his facilities viewpoints with which he does not agree. Under the law he is a public trustee and as such must afford reasonable opportunity for the presentation of differing viewpoints on the controversial issues which he covers . . . As public trustee, the broadcaster must scrupulously eschew intentional and deliberate suppression . . . Therefore, the Commission does act appropriately to protect the public interest in this important respect where we have received extrinsic evidence of such rigging or slanting (for example, testimony, in writing or otherwise, for "insiders" or persons who have direct personal knowledge of an intentional attempt to suppress facts).

In the absence of such extrinsic evidence, the Commission cannot properly intervene and inasmuch as you have not provided the Commission with such evidence to indicate deliberate suppression of the discussion of the translators, further Commission action on this matter is not warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

William B. Ray,
Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HORACE P. ROWLEY III, NEW YORK, N.Y.
Concerning Fairness Doctrine Re Station
WNYC, New York

AUGUST 10, 1973.

HORACE P. ROWLEY, III, Esq.,
416 East 81st Street,
New York, N.Y.

DEAR MR. ROWLEY: This is in reference to your complaint against Radio Station WNYC, New York, New York, in which you allege that the licensee failed to fulfill its obligations under the fairness doctrine.

In your March 20, 1973 correspondence to the Commission you state that WNYC broadcast a series of thirty-minute programs entitled "It's Your City; It's Our Job" on eleven different Sundays during the months of January, February and March 1973; that the producer of the program is District Council 37 of the American Federation of State, County and Municipal Employees (hereinafter union or District Council 37) which represents 115,000 government employees; that the program features members of the union who ". . . discuss the value of their services to the public"; that the union members interviewed on the program imply that District Council 37 members are productive, deserve big pensions, and are valuable to the public; that the controversial issues of public importance discussed on the programs were (1) "whether the government ought to pay public employees bigger salaries and pensions" and (2) "whether the government ought to reduce the power of unions of public employees"; that the programs implicitly presented the union side of these issues; that the union admits that the programs present propaganda on the above mentioned issues; and that the following January 19, 1973 excerpt from the District Council 37 newspaper confirms your contention that controversial issues were discussed and only union views were presented:

> Each week one or two *members* will be featured in interviews to describe their jobs. Most New Yorkers have no idea that there are over 1,200 different job titles in the City system. *For those who believe the press myths about Civil Service workers, the program will provide another opportunity to reach them with the realistic story of hard-working men and women serving New York under frequently adverse conditions.* On a weekly basis, the show will portray a wide range of talents and responsibilities *DC 37*

> *members* bring to operating this City. (Emphasis added by complainant).

You allege that WNYC has not broadcast contrasting views to those expressed by the unions.

In opposition to your complaint, WNYC states in a letter to you dated April 18, 1973 that the purpose of the "It's Your City; It's Our Job" series is to inform the public of the hundreds of different qualifications of employment available and the occupational variety that exists under District Council 37 and to discuss the over-all activity of the union in relation to the service it provides for the general public; that the two issues described by you were never discussed on the program; that the excerpt you quoted from a union newspaper "does not in any way suggest a discussion of big pensions or powerful public employee unions"; that you have failed to provide reasonable grounds for your conclusion that WNYC in its overall programming failed to comply with the fairness doctrine with regard to the two specific issues identified in the complaint; that the station has presented contrasting views in other programs on the issues specified in the complaint;[1] that the issue of the relationship between the people of New York City and the unions of public employees is not a controversial issue of public importance; and that a discussion of job opportunities by members of District Council 37 does not *per se* raise controversial issues which are associated with the organization.

In reply to the April 18 WNYC letter, you state in a letter to the Commission dated April 29, 1973 that the program series is an attempt to recruit more city employees and increase the power of the union; that the value of union services is discussed, and this is an issue in upcoming legislative action; that many of the programs cited by WNYC as presenting various views on the issues of the union's pensions and the power of the unions did not do so; that the WNYC broadcasts on April 17 and 21 of "The Impact of New York City Pensions" was one step toward fulfilling its duty but that the ". . . sheer weight of 16 30-minute programs outweighs it"; and that WNYC's long delay in answering your initial complaint shows bad faith on the part of WNYC in handling complaints.

Previous correspondence with you has set forth the basic elements of the fairness doctrine. See Letter to *Horace P. Rowley, III, Esq.*, 38 FCC 2d 49 (1972); Letter to *Horace P. Rowley, III, Esq.*, — FCC 2d — (January 30, 1973); and Letter to *Horace P. Rowley, III, Esq.*, — FCC 2d— (June 6, 1973). You allege that the issues of (1) "whether the government ought to pay public employees bigger salaries and pensions" and (2) "whether the government ought to reduce the power of unions of public employees" are controversial issues of public importance in New York City. In correspondence dated March 20, April 29, May 30, June 26, and July 2, 1973 you cite various local newspaper stories, articles and local television programs which have discussed the problems of union pensions and the increased power of public employees' unions. It may well be that the problems concerning union pensions and the struggle for more union power of public employee unions in New York City are or have been controversial issues of public importance in New York City. However, both the Commission and the courts have emphasized that to invoke the fairness doctrine, "It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard on the licensee's station." *Healey* v. *FCC*, 460 F.2d 917, 921 (D.C. Cir. 1972). Rather, the complainant must show that the particular broadcast material he cites as having raised a controversial issue of public importance, in fact has presented one side of that issue. Thus, assuming *arguendo* that the issues you specified are controversial issues of public importance, the threshold issue presented is whether the union employees' discussion of their job experiences, employment opportunities, and the value of their services to the public on the program series constituted a presentation of one side of the issues of union pension and union power.

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[1] WNYC notes that on April 17, 1973 it broadcast a program entitled "The Impact of New York City Pensions," which was rebroadcast on April 21, 1973.

You argue that the "It's Your City; It's Our Job" program series features union members explaining the value of their services to the public and that their presentation implicitly presented the union side of the issues of whether government should increase the salaries and pensions of city employees and whether government should reduce the power of the unions. You cite an excerpt from the District Council 37's newspaper to support your contention that the program implicitly presented the union side of the issues you defined. As pointed out above, the licensee in its correspondence stated that it reviewed all the programs listed in your complaint and concluded that the union members featured on the program never discussed the two issues but rather described the occupational variety that exists within District Council 37. The fact that the union might use the program to show its workers in the best light possible does not necessarily imply that those workers discussed the union's side of the controversial issues you defined. You have not provided the Commission with any evidence that the participants in the program presented the union side of the issues you allege were discussed. Moreover, we cannot agree that discussions by union members of various job opportunities in the union and the services that are provided by union members necessarily constitute implicit presentations of union views on such issues as union pensions and union power. The fairness doctrine would be stretched to unworkable lengths if we were to adopt your interpretation, for it would mean that almost any presentation of a party involved in a controversy would constitute a presentation of one side of that controversy. Further, your reliance on an excerpt from the union newspaper to prove your contention that the union side of the controversial issues was discussed appears misplaced. The excerpt only notes that ". . . the program will provide another opportunity to reach them [New Yorkers] with the realistic story of hardworking men and women serving New York under frequently adverse conditions." The excerpt does not state that the union members will present their views on union pensions and union power. Thus, it cannot be held that the licensee was unreasonable in determining that your complaint should be rejected for its failure to state a *prima facie* fairness doctrine case.

Accordingly, and for the reasons set forth above, your complaint is denied.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINSBURG,
Acting Chief, Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-839

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS, OBERLIN, KANS.	Docket No. 19738 RM-1983

REPORT AND ORDER

(Adopted August 2, 1973; Released August 7, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND REID ABSENT.

1. The Commission has before it a Notice of Proposed Rule Making adopted May 9, 1973 (FCC 73-492, 38 Fed. Reg. 13387), inviting comments on a petition filed by the Decatur County Area Chamber of Commerce, Inc. (petitioner), which requested the assignment of Channel 266 to Oberlin, Kansas. This channel could be assigned to Oberlin in conformity with the Commission's minimum mileage separation rule and without affecting any presently assigned channel in the FM Table of Assignments. There were no oppositions to the proposal. Supporting comments were filed by petitioner. Information in the record indicates that petitioner is organized as a non-profit organization and that it has no charter provision for operating a business. It further indicates that a responsible group consisting of Chamber of Commerce members intends to incorporate and apply for the channel if it is assigned, and build and operate a station if authorized.

2. Oberlin, with a population of 2,291 persons, is the seat of Decatur County, which has a population of 4,988 persons,[1] and is located in the northwest portion of Kansas. Oberlin does not have a local aural broadcast station. Petitioner notes that there is no full-time AM radio service in the northwest Kansas-southwest Nebraska area and very limited FM service. It points out that Oberlin serves as a principal trading center for a wide area of northwest Kansas and southwest Nebraska, and has sufficient size and economic strength to support a Class C FM facility. Petitioner contends that a Class A station operating at Oberlin would serve so small an area and audience that it could not survive. Petitioner states that based on the reasonable facilities assumption, a Class C facility, operating with an ERP of 100 Kw and an antenna height of 500 feet at Oberlin, would serve a total population of 33,711 persons, with 20,048 people receiving a first FM service and 13,663 receiving a second FM service in an area of 1,648 and 2,138 square miles, respectively.

3. The preclusion study indicates that the proposed assignment would foreclose future assignments on six channels: Channel 264,

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[1] Population figures cited are from the 1970 U.S. Census.

265A, 266, 267, 268 and 269A. The size of the precluded areas varies with the channel. However, in the sparsely populated areas of the northwestern part of Kansas and the southwestern part of Nebraska, a number of other FM channels are available which could be assigned to communities located in the precluded areas.

4. The Commission would ordinarily assign a Class A channel to a community the size of Oberlin, but under the above circumstances and the fact that this assignment will provide a first local FM service, we conclude that the public interest would be served by assigning Channel 266 to Oberlin, Kansas.

5. Authority for the amendment adopted herein is found in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

6. Accordingly, IT IS ORDERED, That, effective September 14, 1973, the Table of Assignments contained in Section 73.202(b) of the Commission's Rules and Regulations IS AMENDED, insofar as the community named below is concerned to read as follows:

City	*Channel No.*
City: Oberlin, Kans	266

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73D-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of HOMER AIR SERVICE, INC.	Docket No. 19618 File No. 195-A-L-62
COOK INLET AVIATION, INC. For an Aeronautical Advisory Radio Station To Serve the Homer Airport, Homer, Alaska	Docket No. 19619 File No. 162-A-L-62

APPEARANCES

Ray E. Martin for Homer; *Robert W. Gruber* for Cook; and *Sherman W. Pratt* for the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE HERBERT SHARFMAN

(Issued June 11, 1973; Effective August 6, 1973 pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. Under delegated authority, by order released November 6, 1972, the Chief of the Safety and Special Radio Services Bureau designated these applications for consolidated hearing. Only one aeronautical advisory station may operate at a landing area (Rule 87.251(a)), and as the applications are mutually exclusive a hearing was necessary to choose, if possible, the better qualified applicant.

2. Aeronautical advisory radio stations, usually called Unicom stations, may, under the rules, provide non-public (unpaid) service to any private aircraft upon request and without discrimination. Communications are limited to the necessities of safe and expeditious operation of private aircraft, and to information on the conditions of runways, types of fuel available, wind conditions, weather information, dispatching, or other necessary information. At larger landing areas like major airports, where there are aerodrome control or FAA flight service stations operating, the advisory stations may not transmit information on the conditions of runways, wind conditions or weather data. At such fields, a pilot may get that information from the control tower, and from the advisory station the other personal service information. Advisory stations are sometimes licensed to municipalities or other owners of the landing areas; they may designate fixed base operators or others to operate the stations for the owner-licensees. More often, however, the stations are operated directly by fixed base operators like the present applicants. Although, as already noted, the rules permit only one station to operate at a landing area, provision is made in

Rule 87.75 for the establishment by the licensee of dispatch points, or, with the Commission's approval, of remote control points through which persons or firms other than the licensee may participate in the operation. The rules do not *require* the establishment of dispatch or remote control points, but many licensees have found it to their advantage to allow this arrangement, as it may discourage the filing of burdensome and expensive competing applications.

3. Except as indicated in the issues specified in the designation order, the applicants are qualified. The hearing issues are:

a. To determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:
(1) Location of the fixed-base operation and proposed radio station in relation to the landing area and traffic patterns;
(2) Hours of operation;
(3) Personnel available to provide advisory service;
(4) Experience of applicant and employees in aviation and aviation communications;
(5) Ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's rules;
(6) Proposed radio system including control and dispatch points; and
(7) The availability of the radio facilities to other fixed-base operators.
b. To determine in light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted.

4. A prehearing conference and hearing were held in Seattle, Washington, on April 3, 1973, before Administrative Law Judge Millard F. French. The record was closed on that date. Both applicants waived their right to file initial proposed findings of fact and conclusions (Tr. 103), but were permitted, if they wished, to reply to the Bureau. The Bureau filed proposed findings of fact and conclusions on May 7, 1973. Applicants could have replied by May 29, but they have not done so. On the death of Judge French, the Chief Administrative Law Judge designated the writer of this initial decision "to preside in this matter." The following findings of fact and conclusions are adopted, in the main, from the Bureau's pleading.

FINDINGS OF FACT

5. *Homer Air Service, Inc.* is an Alaska corporation. Its stock is held by its president, Ray E. Martin (63%), his wife, Diane Martin (2%), and Louise Lawrence (35%). Mrs. Lawrence was the wife of Gene Lawrence, who established Lawrence Aircraft Service, Inc. Homer has an Air Commerce Certificate (Air Taxi Operator) from the Alaska Transportation Commission, dated January 2, 1973, transferred from Lawrence Aircraft. (The certificate had been issued to J. J. Carroll, president of Lawrence, which operated an air taxi and charter service.) Homer is the successor to Lawrence, and in this respect the oldest authorized flying service and communications facility at Homer Airport.

6. Homer's station would be near the middle of the southeast side of Homer Airport. From its windows on three sides one can see the landing strip, all taxiways, and the transit parking area, as well as the traffic patterns and seaplanes and skiplanes landing on Beluga Lake nearby. The lake itself, however, is not visible from the station.

7. Its station would operate "approximately all daylight hours, 7 days per week, and every day of the year, except Christmas day" (Homer Ex. 1, p. 2).

8. Applicant's operating personnel would be Ray E. Martin, Dorothy M. Abbott, and Ray E. Kranich. Mr. Martin has lived in the Homer, Alaska, area since 1955. He was born in Anchorage, Alaska. He is a qualified pilot and operator with over 6,000 flying hours, mostly in the Homer area. Mr. Martin has been associated with aviation in Alaska since 1962 and has held a commercial license since 1965. For two years he was a bush pilot, and for three years he flew Army helicopters, one year of which was in Vietnam. After his honorable discharge from the Army he worked for Cook Inlet Aviation, Inc. until he bought the majority stock in Lawrence Aircraft Service, Inc. in the spring of 1971. Dorothy M. Abbott has a restricted radiotelephone operator permit. She has been Homer Air Service's radio operator for the past two years, and has been engaged in aviation radio operation since 1965. Mr. Kranich, born and raised in Homer, also has an operator permit. He is a pilot for Homer Air Service. Since 1958 he has been a private pilot. He received a commercial pilot's license in 1965. Since then he has flown commercially in the Homer area "off and on" (Homer Ex. 1, p. 4). Applicant Homer also operates in the Marine Mobile and Citizens radio services and will use operators already operating those stations.

9. Homer services aircraft at Lake Beluga, when necessary. It has in its office a list of services available in the Homer area compiled from the local telephone directory, including lodgings, restaurants, car rentals, and aviation services. Applicant has a direct telephone line to the FAA at Homer Airport. Both Homer and Cook, its competing applicant, sell Standard Oil gas at the airport, but Homer is the only "authorized" Standard Oil dealer there.

10. Homer will use a NARCO VGTR-3 in its radio system. The antenna will be no more than 20 feet above the structure on which it is mounted. The transmitter is listed in the Commission's Radio Equipment List, January 12, 1973, as type-accepted with 10 watts output power. From the transmitter there would be a view out of the three windows. The transmitter has an adequate range for the mountainous terrain in which it will operate.

11. Applicant Homer's radio facility will be available to other fixed base operators at Homer Airport. It will permit the installation of dispatch points, or remote control points with Commission approval.

12. *Cook Inlet Aviation, Inc.* is also an Alaska corporation. It was incorporated in 1962, and has three stockholders. They are Robert W. Gruber, president (80%), Charles S. Hendrix, vice president (10%), and Jack P. English, secretary-treasurer (10%). Only Mr. Gruber, however, is at the Homer Airport.

13. Cook's proposed station at the airport would be about 150 feet south of Homer's. While the visibility from the interior does not seem to be as panoramic as from Homer's station, an operator from Cook's facility can with little effort obtain an adequate view of all landing areas (Tr. 75).

14. Before 1962, when it was incorporated, Cook did business at the airport under a different name, and in this way has been in the air taxi service since 1951.

15. The hours of operation of Cook's station would be substantially the same as Homer's. It would operate ordinarily from 8 a.m. to 5 p.m. and in summer from 6 or 7 a.m. to 10 or 11 p.m.

16. For its operation Cook would use its president, Mr. Gruber, its pilots and mechanics, and the president's "agent," a woman dispatcher, in total seven or eight. One of these would always be around to operate the station. All are qualified for radio operation. Details of their experience follow (Pars. 17–23).

17. Mr. Gruber has been in the Homer area for almost 20 years. He has accumulated over 10,000 hours of flying time in the area, and knows the location of aviation facilities and service and sources of assistance.

18. Of the two mechanics, one is an aeronautical inspector who is authorized to perform major aircraft alterations and annual aircraft inspections.

19. The pilot-mechanic has been in Alaska over 30 years. He is retired from a commercial airline, and at the time of the hearing was in Cook's employ about two years. He has about 15,000 hours experience in aircraft engine maintenance with many types of equipment in Alaska.

20. The "chief pilot" "has a good background in aviation for a number of years before coming to" Cook (Tr. 62).

21. The dispatcher "agent" has worked for Cook for over four years. She [1] dispatches airplanes to take passengers and freight to and from Homer Airport, and is experienced in furnishing weather information.

22. An aircraft gassing-loading-and-unloading man (general handyman) has been a manager for one airline and station manager for another, and was an aircraft controller in the military service.

23. There is also a part-time Cook pilot who has been in the area for five or six years.

24. Cook furnishes fuel to transient aircraft pursuant to a business license, performs aircraft repair and maintenance service, has a car rental service, can order taxis on demand, and can provide weather information which it gets from the FAA three times a day.

25. For its equipment Cook would use the same model transmitter proposed by Homer. The maximum height of the antenna would be 20 feet above a ground elevation of 80 feet. Applicant has not yet obtained radio equipment, but has been in touch with suppliers, who indicate that it is immediately available.

26. Cook would be willing to permit other base operators to share in the use of the advisory station through dispatch or remote control points under a mutually agreeable and reasonable cost-sharing arrangement.

CONCLUSIONS

27. Neither applicant merits a preference over the other with respect to Issues a. (1), (2), (6), and (7). Both propose to operate an advisory

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[1] The transcript (Page 63, line 2) reads "he," but it is assumed that this is the woman "agent" previously referred to.

station from about the same location and during the same hours. They would use the same make and model of transmitter, with an antenna of the same height. Each would make its radio facilities available to other base operators through dispatch or remote control points. Insofar as these issues are concerned, then, both applicants appear fully qualified and capable of operating an efficient and effective advisory radio station. In concluding that applicants are on a par on these issues it has not been forgotten that the architecture of Homer's station seems better suited to wide visibility than Cook's. But on this point the following excerpt from the present writer's initial decision in *Anthony Maier Enterprises, Inc.*, *et al.*, 37 FCC 2d 366, 371 (1972), may be quoted: "Also, the advantage of a possible panoramic view of all landing strips from the inner station area is not as important in the airport advisory service as to a control station, since the advisory station does not 'talk down' planes, and the operator who is asked by a pilot about the best landing strip need only step outside to inform himself." It is also recognized that in this relatively simple but nevertheless important service differences between qualified applicants like these can hardly be dramatic, and that choices in a comparative case must necessarily turn on such distinctions, albeit not in themselves striking, as are present.

28. With respect to Issues a. (3) and (4) (personnel and experience), while both applicants appear to be about equally qualified in radio station operating experience, Cook is clearly superior overall. It has seven or eight people available to operate the station as compared to three for Homer. Although at these magnitudes differences recede in significance, it might be pointed out that the president and manager of Cook has 10,000 hours of area flying time as against 6,000 for Homer's chief principal. Cook's operating personnel would include several mechanics of varied and impressive qualifications and experience, whereas Homer has no mechanics and furnishes no maintenance service.

29. Under Issue a. (5) (ability to provide information on weather,[2] lodging, fuel, ground transportation, etc.) Cook has a slight comparative advantage. It operates its own service, transportation and maintenance facilities; on the ground Homer appears to be engaged primarily in fueling operations. Although Homer has the only "authorized" franchise for fuel sales, Cook appears equally able to fuel aircraft or obtain fuel for sale. Cook, as a firm, and its personnel as individuals, have been at Homer Airport much longer than Homer and its personnel, notwithstanding the fact that Homer's predecessor may have done business at the field. There is no evidence that any of the previous firm's personnel (other than Mr. Martin, who flew as a bush pilot for Lawrence for two years) are now employed by or otherwise available to Homer. While Homer maintains a directory of local services, this is hardly the equal of information and service available from people like Cook's personnel who have been in the area many years and have firsthand knowledge.

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[2] Rule 87.257(d) says that advisory stations may not furnish weather or other information at a landing area when a control or FAA service station operates. The record is silent on the hours of such a station at Homer Airport. The advisory station could of course transmit weather information when the airport control or service station is silent.

30. Accordingly, because public interest, convenience, and necessity would be served, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the rules, the above-captioned application of Cook Inlet Aviation, Inc., for a license to operate an aeronautical advisory radio station to serve the Homer Airport, Homer, Alaska, is GRANTED; and the competing application of Homer Air Service, Inc. is DENIED. The grant to Cook Inlet Aviation, Inc. is subject to the condition that it shall seasonably and in good faith enter into negotiations for dispatch points with any other willing base operator.

FEDERAL COMMUNICATIONS COMMISSION,
HERBERT SHARFMAN, *Administrative Law Judge.*

F.C.C. 73-836

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KBLU BROADCASTING CO., YUMA, ARIZ. For Consent To Acquire the Licenses of Stations KBLU and KBLU-TV, Yuma, Ariz.	BAL-7794-BALCT-499

AUGUST 2, 1973.

Mr. ROBERT W. CRITES,
KBLU Broadcasting Co.,
1301 Third Avenue,
P.O. Box 1501,
Yuma, Ariz.

DEAR MR. CRITES: This is in reference to your applications for consent to acquire, by assignment, the licenses of Stations KBLU and KBLU-TV, Yuma, Arizona, from KTAR Broadcasting Corporation and Eller Broadcasting Company, respectively, which are wholly owned subsidiaries of Combined Communications Corporation (BAL-7794: BALCT-499) and your request for waiver of the Commission's Multiple Ownership Rules, Sections 73.35(a) and 73.636(a)(1).

The Commission has reviewed your request and submissions in support, as well as other market data available from Commission records, and, after finding KBLU Broadcasting Company fully qualified, has determined that the conditions of the Yuma market have not substantially changed since the time, March 10, 1971, when the Commission waived the above-mentioned rules permitting common ownership of Stations KBLU and KBLU-TV by Combined Communications Corporation. Since there has been no marked improvement of the market conditions, extension of the waiver of the Commission's Multiple Ownership Rules with respect to these stations is warranted. Therefore, the Commission has concluded that waiving Sections 73.35(a) and 73.636(a)(1) of its rules and granting these applications will serve the public interest, convenience and necessity.

Chairman Burch not participating. Commissioner Johnson dissenting. Commissioners H. Rex Lee and Reid absent. Commissioners Wiley and Hooks concurring in the results.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-860

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
CHARLES A. HASKELL, MAX G. BROOKS AND ALVIN G. FLANAGAN, AS CO-EXECUTORS OF THE ESTATE OF JOHN C. MULLINS, DECEASED, ASSIGNORS
and
MISSION DENVER CO., ASSIGNEE
For Assignment of License of Station KBTR, Denver, Colo.

File No. BAL-7409

MEMORANDUM OPINION AND ORDER

(Adopted August 8, 1973; Released August 15, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE, REID AND HOOKS ABSENT.

1. The Commission has before it a pleading entitled "Petition for Reconsideration, Vacation of Order and Suspension or Waiver of Rules" filed on May 22, 1973, by Colorado Citizens for Broadcasting *et al.* (CCB) and responsive pleadings. CCB seeks reconsideration of the Commission's Memorandum Opinion and Order, released July 28, 1972, which granted the above captioned application and denied petitions to deny filed by CCB and Lakewood Broadcasting Service, Inc. 36 F.C.C. 2d 78 (1972). The Commission's action was appealed and was affirmed *sub nom. Lakewood Broadcasting Service, Inc.* v. *FCC*, Nos. 72-1757-58 (D.C. Cir. May 4, 1973). The appellants, Lakewood Broadcasting Service and CCB, filed petitions for rehearing or remand which were denied by the court on May 24 and May 31, 1973, respectively. The court's mandate issued on June 8, 1973. Accordingly, the Commission's decision is now final.

2. The instant petition for reconsideration of the Commission's action of July 28, 1972 was filed by CCB on May 22, 1973. Lakewood Broadcasting Service filed a statement in support of the petition. The petition for reconsideration was not filed within 30 days of the public notice of the Commission's action as required by Section 405 of the Communications Act and it cannot, therefore, be accepted as a petition for reconsideration under the provisions of the Act. The court's mandate has issued and the Commission's decision is now final and no longer subject to further consideration in the absence of a recall of the court's mandate. The allegations contained in the petition do not warrant a request for such recall. (See *Greater Boston Television Corp.* v. *FCC*, 463 F. 2d 268 (D.C. Cir. 1971).) It is noted in this regard that substantially the same allegations contained in the petition were also

made in the petitions for rehearing or remand which were denied by the court.

3. Accordingly, IT IS ORDERED That the above petition for reconsideration filed by Colorado Citizens for Broadcasting, *et al.*, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73–822

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MOCATTA METALS CORP., COMPLAINANT v. ITT WORLD COMMUNICATIONS, INC., DEFENDANT	Docket No. 19799

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 14, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. The Commission has before it a complaint and a request for an injunction filed on July 13, 1973 by Mocatta Metals Corporation, 25 Broad Street, New York, New York (hereinafter referred to as "Mocatta" or "complainant"). The Complaint was filed against ITT World Communications, Inc., 67 Broad Street, New York, New York (hereinafter referred to as "ITT" or "defendant").

2. The complaint states that Mocatta is the largest silver and gold bullion dealer in the United States, and, in addition, is involved in the processing, storage and refining, transporting and financing of precious metals throughout the world; that Mocatta maintains a worldwide communications network required for instant contact with floors of the world's major exchanges and with Mocatta's representatives and customers; that on November 23, 1971, ITT and Mocatta entered into an agreement under the terms of which ITT was to provide a communications system to Mocatta within 90 days, but that it was not until September 18, 1972 that service commenced; on or about October 25, 1972 Mocatta informed ITT that it would not pay for the system, because it still was not operational, in Mocatta's opinion; and that ITT notified Mocatta that notwithstanding any disagreements between the parties they would expect full reimbursement for services rendered over the ten-month period.

3. ITT is a common carrier of international communications subject to this Commission's jurisdiction. ITT leases channels to customers, such as Mocatta, for the simultaneous transmission of voice and data messages between the offices of such customers in this country and the customers' offices in Europe and elsewhere.

4. The complaint arises from:

> (a) ITT's alleged breach of a contract to provide to Mocatta a Simultaneous Voice Data Leased Channel including an alternative voice-data and four teletype channels (collectively referred to herein as "the System"); the terms of which agreement are regulated by ITT World Communications, Inc. F.C.C. Tariff No. 43 ("the Tariff");

(b) The alleged negligence of ITT in the installation and maintenance of the System;

(c) ITT's alleged violation of its statutory duties under 47 U.S.C. § 201 which provides that: "(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communications service upon reasonable request therefor; * * * (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. * * * The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."

(d) ITT's alleged rendering of a bill in an amount substantially in excess of the amount believed by Mocatta to be owing.

(e) ITT's announced intention to cut off service on the System to Mocatta notwithstanding the claim of irreparable injury by Mocatta and Mocatta's offer to pay one-half of the amount billed plus current billings, under protest, or to escrow with an independent third party the entire amount claimed to be due, pending resolution of the dispute.

5. Under Section 1.717 of the Commission's Rules, ITT's response to the complaint is due on or before August 20, 1973. However, on July 20, 1973, both parties filed memoranda on the question of issuing an injunction. This Memorandum Opinion and Order is directed only to Mocatta's request that the Commission issue an injunction against ITT pending a determination of the merits of the dispute. For the reasons stated hereafter, we decide that an injunction should not issue.

6. Prior to filing its complaint, Mocatta commenced suit in the United States District Court for the Southern District of New York on June 25, 1973 and on that date sought and obtained a temporary restraining order enjoining ITT from terminating service. On the return date of that order, July 3, 1973, Judge Whitman Knapp ordered the "stay extended for two weeks, to permit plaintiff to make (an) application to the FCC."

7. Mocatta has asserted that the Commission has general authority to enjoin ITT from terminating its service. In support of this assertion they cite *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and Section 4(i) of the Communications Act. However, the basic issue involved here is not the authority of the Commission to issue an injunction, but whether the Commission should issue an injunction under the particular facts of this case. This is so, because even if we assume the Commission has general authority to issue injunctive relief, this does not appear to be a case requiring the invocation of such authority. Injunctive relief historically is an extraordinary remedy which will only be applied if the applicant for the remedy has no other recourse at law, and is likely to suffer irreparable injury. In addition, the Complainant should show a likelihood of prevailing on the merits.[1] Here there can be no question but that the complainant has an adequate remedy "at law". Section 207 of the Act offers the complainant two forums wherein he can seek legal remedies for any charges levied against him which he considers to be unlawful. Secondly, there is the test of irreparable injury. As stated in our report and order in *Fees Schedule*, 24 FCC 2d 614 (1970):

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[1] Developments in the law—Injunction, 78 Harv. L. Rev. 944 (March, 1965).

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

The complainant has not proven that any injury suffered by Mocatta will be more than monetary, i.e., compensable by money damages which can be determined and easily recovered should the carrier's action be found to be unlawful. Despite Mocatta's claims to the contrary, no real dilemma poses itself for Mocatta. Since Mocatta has a way it can continue to receive communications service—by paying ITT's charges—and recover any monies paid by it which were "unlawful"—by pressing forward with the present complaint. We cannot accept the complainant's assertion that an injunction should issue and therefore must reject its request.

8. This complaint has been filed pursuant to Sections 207 and 208 of the Act for recovery of damages. This Commission clearly has jurisdiction over this type of dispute. In accordance with Section 208 of the Act the Commission has requested a reply from ITT to this complaint by August 20, 1973. The Commission is of the view that until such time as these issues have been finally and conclusively resolved on their merits that it should retain jurisdiction of the matter.

9. Accordingly, for the reasons stated above, IT IS ORDERED, That request for an injunction is DENIED, provided however that such denial is without prejudice to any action which the Commission may take after all the facts are available to it pursuant to relevant provisions of law (See Section 203, 501 and 502 of the Communications Act of 1934).

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-855

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 1 OF THE COMMISSION'S
RULES AND REGULATIONS

ORDER

(Adopted August 8, 1973; Released August 13, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE, REID AND HOOKS ABSENT.

1. Our rules currently provide that checks submitted to us in payment of forfeiture are to be made payable to the Order of the Treasurer of the United States. The Treasury Department, however, has instructed agencies to cause remittors to inscribe checks to the Order of the specific agency and not to the Treasurer of the United States. We, therefore, herein amend our rules to substitute "Federal Communications Commission" in place of "Treasurer of the United States" as the payee set forth in rules 1.80(g)(1), 1.80(i), 1.621(e), 1.991(b)(1) and 1.991(c) covering payment of forfeitures.

2. The amendments adopted herein are procedural in nature, and, hence, the prior notice, procedure, and effective date provisions of 5 U.S.C. § 553 are not applicable.

3. Accordingly, IT IS ORDERED, effective August 21, 1973, pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.231(d) of the Commission's Rules and Regulations, that Part 1 is amended as set forth in the appendix attached hereto.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

§ 1.80(g)(1) and (i) are revised to read as follows:

§ 1.80 *Forfeiture proceedings (excluding those pertaining to broadcast licensees and permittees or ships and shipmasters).*

* * * * * * *

(g) * * *

(1) *Payment of the forfeiture in the amount specified in the Notice of Apparent Liability.* The forfeiture should be paid by check or money order drawn to the Order of the Federal Communications Commission and should be mailed to the Federal Communications Commission, Washington, D.C. 20554. The Commission does not accept responsibility for cash payments sent through the mails.

* * * * * * *

(i) *Commission action after written statement or interview.* After the submission of a written statement and/or after a personal interview, as prescribed in paragraphs (g) and (h) of this section, the Commission will consider all relevant information available to it. Based on such considerations, the Commission will (1) cancel the forfeiture, or (2) offer to reduce the amount of the forfeiture, or (3) require the forfeiture to be paid in full. A notice of such Commission action, stating the amount of the forfeiture (if any), and the date by which it must be paid, will thereupon be mailed to the station licensee or radio operator involved. The forfeiture in the amount stated shall be paid by check or money order drawn to the Order of the Federal Communications Commission, Washington, D.C. 20554. The Commission does not accept responsibility for cash payments sent through the mails.

* * * * * * *

§ 1.621(e) is revised to read as follows:

§ 1.621(e) *Forfeiture relating to broadcast licensees and permittees.*

* * * * * * *

(e) Payment of forfeitures shall be made by check or similar means drawn to the Order of the Federal Communications Commission and mailed to the Commission.

* * * * * * *

§ 1.991(b)(1) and (c) are revised to read as follows:

* * * * * * *

(b) * * *

(1) *Payment of the forfeiture in the amount specified in the Notice of Apparent Liability.* The forfeiture should be paid by check or money order drawn to the Order of the Federal Communications Commission and should be mailed to the Federal Communications Commission, Washington, D.C. 20554. The Commission does not accept responsibility for cash payments sent through the mails.

* * * * * * *

(c) *Commission action after written statement.* After the submission of a written statement, as prescribed in paragraph (b) of this section, the Commission will consider all relevant information available to it. Based on such considerations, the Commission will (1) cancel the forfeiture, (2) offer to reduce the amount of the forfeiture, or (3) require the forfeiture to be paid in full. Notice of such Commission action, stating the amount of the forfeiture (if any) and the date by which it must be paid, will thereupon be mailed to the shipowner and/or the shipmaster involved. The forfeiture in the amount stated shall be paid by check or money order drawn to the Order of the Federal Communications Commission and shall be mailed to the Federal Communications Commission, Washington, D.C. 20554. The Commission does not accept responsibility for cash payments sent through the mails.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MRS. RITA MOORE, RED LODGE, MONT.
Concerning Personal Attack Re Station KRBN

AUGUST 17, 1973.

MRS. RITA MOORE,
P.O. Box 1146,
Red Lodge, Mont.

DEAR MRS. MOORE: This will refer to your July 18, 1973 complaint against KRBN, Red Lodge, Montana, concerning certain statements made about you by a KRBN "disc jockey." You state that "because you had the misfortune to have an accident," the "disc jockey" made "belittling" comments about you with respect to this incident which has caused you much embarrassment in the community. You have inquired as to the Commission policy in situations like this and what action you could take against the station.

The selection and presentation of specific program material are the responsibility of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if during the presentation of views on a controversial issue of public importance an attack is made upon an identified person, it is the duty of the licensee to notify the person attacked, to send a recording, transcript or as accurate a summary as possible, and to afford an opportunity for a response. Please note, however, that mere mention of a person, or even certain types of unfavorable references thereto, do not constitute a personal attack[1] as defined by the Commission: and that bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events are exempt from the personal attack rules. A personal attack, for the purposes of the Commission's Rules, is an attack "upon the honesty, character, integrity or like personal qualities of an identified person."

We have reviewed the tape of the broadcast which you furnished the Commission. It appears that the station announcer's references to you were associated with the circumstances surrounding your automobile accident. For example, he referred to you as "Mrs. Moore, self appointed guardian of Red Lodges sidewalk decorum," and stated "that several Red Lodge residents have expressed the sentiment that it couldn't have happened to a more deserving person." It does not appear, however, that any of the statements in the broadcast constituted attacks upon your "honesty, character, or integrity" within the meaning of the Commission's Rules, but rather could best be characterized as satirical, unfavorable references to you. In any event, there is no evidence to indicate that remarks referring to you occurred during the discussion of a controversial issue of public importance, which is a requirement under the personal attack rules. Therefore, based on the information presently before the Commission, it does not appear that further action is warranted on this matter.

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[1] Section 73.123(a) states:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a scrip or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission. Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINSBURG,
Acting Chief, Complaints and Compliance Division,
for Chief, Broadcast Bureau.

F.C.C. 73-851

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of
POLE ATTACHMENT PROCEEDING }

AUGUST 3, 1973.

THE COMMISSION BY COMMISSIONERS BURCH (CHAIRMAN), JOHNSON, WILEY, AND HOOKS, WITH COMMISSIONER ROBERT E. LEE DISSENTING WITH A STATEMENT ISSUED THE FOLLOWING PUBLIC NOTICE.

POLE ATTACHMENT PROCEEDING

The Commission today instructed the staff to draft appropriate documents asserting jurisdiction over pole attachments and conduit agreements and arrangements for cable television usage; such jurisdiction to be exercised in those instances where adequate provisions in this respect have not been made by State or other local jurisdictions. The Commission's intention is to offer the interested parties adequate opportunity to reach mutual agreement with respect to such pole and conduit usage arrangements within a 90-day period from July 31, 1973. If mutually satisfactory agreements have not been reached, the Commission would propose to enter into formal rule making proceedings designed to implement fully all aspects of its jurisdiction. The Commission further expressed the view that all parties should maintain the status quo in effect on July 31, 1973, pending outcome of the negotiations, and noted that the General Telephone Company of California, Inc., had agreed voluntarily to forbear from implementing its proposed increases in pole attachment charges during the 90-day negotiating period.

This action was taken in Dockets 16928, 16943 and 17098.

DISSENTING OPINION OF COMMISSIONER ROBERT E. LEE

I have dissented to the Commission's action to draft appropriate documents asserting jurisdiction over pole attachments and conduit agreements and arrangements for cable television usage.

The Commission, in its Public Notice dated August 3, 1973, did not spell out the legal basis for the assertion of such jurisdiction. Therefore, it is difficult to challenge such notice. However, I believe that the agreements between public utilities and CATV owners and operators are simply private contractual arrangements beyond the purposes, objectives and authority of the Communications Act of 1934, as amended. To extend the regulatory processes, as suggested by the Commission's Public Notice, is to invite further governmental involvement which is neither required nor desirable. Where do we stop?

"Quel dommage"

F.C.C. 73-861

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTIONS 73.40, 73.49, 73.60, 73.63, 73.89, 73.113, 73.114, 73.252, 73.255, 73.283, 73.284, 73.295, 73.297, 73.317, 73.330, 73.331, 73.552, 73.555, 73.583, 73.584, 73.595, 73.596, 73.672, 73.687, 73.690, 73.692 AND 73.693 OF THE RULES, CONCERNING FREQUENCY MONITORS AND THE MAINTENANCE OF THE OPERATING FREQUENCY OF STATIONS
Docket No. 19712

REPORT AND ORDER

(Adopted August 8, 1973; Released August 14, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE, REID AND HOOKS ABSENT.

1. In its continuing effort concerning the re-regulation of the broadcast services the Commission released a Notice of Proposed Rule Making in this proceeding on March 26, 1973 (FCC 73-322). The closing dates for comments and reply comments were May 3, 1973, and May 14, 1973, respectively. Publication was made in the Federal Register on March 30, 1973 (38 Fed. Reg. 8280).

2. Comments were filed by standard broadcasting station KTIX, Time and Frequency Technology, Inc., KITN-KITI Corporation, Westinghouse Broadcasting Company, Inc., American Broadcasting Companies, Inc., Summit Radio Corp., Group One Broadcasting Co., Inc. and Lake Huron Broadcasting Corporation. No reply comments were filed.

3. The Notice looked toward amending the Commission's rules as follows: (1) deleting the requirement that AM and FM stations be equipped with type approved frequency monitors (this requirement was deleted from the TV rules in 1964); (2) deleting provisions for type approval of frequency monitors; (3) deleting requirements concerning three-hour and daily frequency checks; and (4) requiring that carrier and subcarrier frequencies be actually measured at least once a month. These amendments were proposed on the basis that automatic frequency control of transmitters, which is required by our rules, has provided an inherent frequency stability which substantially exceeds requirements; and this inherent capability, coupled with actual performance of modern-vintage transmitters, should be reflected in our rules.

4. The comments of KTIX. Westinghouse, ABC, Summit, Group One and Lake Huron urged adoption of the rules as proposed. Time

and Frequency Technology, Inc., urges that the Commission retain the existing frequency monitor requirements; that they be expanded to include television; and that provisions for type approval of frequency monitors be revised to require tighter frequency accuracy than presently specified. KITN–KITI Corporation objects to the proposed requirement that frequencies be measured at least once a month and suggested that it would be sufficient to prescribe a maximum frequency tolerance and let the licensee bear responsibility for proper operation, with citations being issued for violations.

5. The position taken by Time and Frequency Technology, Inc., must be rejected on the ground it tends toward unnecessary overregulation. The suggestion that the Commission should require continuous frequency monitoring and that provisions for type approval of frequency monitors should be revised to require tighter frequency accuracy would, if adopted, have no direct effect on actual transmitter performance, and it is on the basis of transmitter performance that the subject rule amendments are being considered. The record in this proceeding confirms that frequency instability is simply no longer a significant problem; certainly not one which warrants requiring that frequency be continuously monitored.

6. The suggestion of KITN–KITI must also be rejected. The Commission's regulatory responsibility goes beyond merely detecting and penalizing licensees who do not comply with its rules. It must establish any reasonable standards which tend to assure performance in the interest of preserving the integrity of existing service. While the performance record of some stations may support adoption of a standard prescribing annual or semi-annual frequency measurements, given some 8,300 licensed broadcasting stations, the Commission's rules must include such provisions as will reasonably assure adequate performance of all stations. In the Commission's view, such assurance requires adoption of the standard we have proposed, i.e., frequency measurements once each month. This conclusion is based upon the record established in this proceeding and the Commission's experience with a similar standard already included in its rules governing the television service.

7. In taking action in this proceeding, the Commission directs attention to two matters which should be emphasized. First, the rules being adopted do not preclude the use of frequency monitors. Licensees who wish to use such devises may do so. Secondly, many frequency monitors do not possess a capability for providing an accurate measurement of the *actual* transmitter frequency. Whatever procedure a licensee elects to employ, what is clearly required is an accurate measurement of the actual carrier and subcarrier frequencies.

8. We believe that the rule amendments adopted herein are in the public interest. They are, in all essential respects, as set forth in the Notice. Departures from the proposal are principally editorial, except for two provisions. First, the Notice proposed to amend Section 73.638, "Auxiliary transmitters", to provide expressly that frequency measurements be made on such transmitters. It is unnecessary to adopt this proposal since it merely reiterates the requirements of Section 73.690 which prescribes that frequency measurements be made on whatever transmitter is being used. Second, the language of the existing rules concerning the use of modulation monitors at auxiliary transmitters

(Sections 73.89, 73.330) does not reflect the fact that remote control operation of such transmitters, as well as of main transmitters, is authorized pursuant to other provisions of the Commission's Rules. Sections 73.89 and 73.330 will be amended to reflect that fact. These amendments, which are minor and noncontroversial, merely conform the sections with other existing rules and outside participation in their adoption is clearly not a prerequisite. Therefore, prior notice of rule making and public procedure on Sections 73.89 and 73.330 are unnecessary, pursuant to the Administrative Procedure and Judicial Review provisions of 5 U.S.C. 553(b)(3)(B).

9. Having considered all of the information before it, and in accordance with the foregoing discussion, **IT IS ORDERED**, That, effective November 21, 1973, the Commission's Rules and Regulations are amended as set forth in the attached Appendix.

10. Authority for the action taken herein is contained in Sections 4(i), and 303 (j) and (r) of the Communications Act of 1934, as amended.

11. **IT IS FURTHER ORDERED**, That this proceeding **IS TERMINATED.**

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

1. Section 73.40(a)(10) is amended to read as follows:

§ 73.40 Transmitter; design, construction, and safety of life requirements.

(a) * * *

(10) Means are provided for connection and continuous operation of an approved modulation monitor.

* * * * * * *

§ 73.49 [Deleted]

2. Section 73.49 is deleted.

3. Section 73.60 and headnote are amended to read as follows:

§ 73.60 Frequency measurements.

(a) The carrier frequency of the transmitter shall be measured as often as is necessary to ensure that it is maintained within the prescribed tolerance. However, in no event shall the interval between successive measurements exceed 31 days.

(b) The primary standard of frequency for radio frequency measurements shall be the national standard of frequency maintained by the National Bureau of Standards, Department of Commerce, Washington, D.C. The operating frequency of all radio stations will be determined by comparison with this standard or the standard signals of stations WWV, WWVB, WWVH and WWVL of the National Bureau of Standards.

4. Section 73.63 is amended by adding a new paragraph (g) and redesignating existing paragraphs (g) and (h) as (h) and (i) respectively to read as follows:

§ 73.63 Auxiliary transmitter.

* * * * * * *

(g) The carrier frequency of the auxiliary transmitter shall be measured as often as is necessary to ensure that it is maintained within the prescribed tolerance. If the transmitter is used daily for a period of more than 31 days, the interval between successive measurements shall not exceed 31 days.

(h) The authorized antenna input power of an auxiliary transmitter may be less, but not more, than that of the regular transmitter. If it is less, the actual operating power is not limited to 105% of the authorized antenna input power of the auxiliary transmitter but shall in no event exceed the authorized antenna input power produced by the regular transmitter.

(i) All regulations as to safety requirements and spurious emissions applying to broadcast transmitting equipment shall apply also to an auxiliary transmitter.

5. Section 73.89 and headnote are amended to read as follows:

§ 73.89 Use of modulation monitors at auxiliary transmitters.

(a) The following shall govern the installation of approved modulation monitors at auxiliary transmitters:

(1) Installation of an approved modulation monitor at the location of the auxiliary transmitter, when different from that of the main transmitter, is optional with the licensee. However, when it is necessary to operate the auxiliary transmitter beyond two (2) calendar days, a modulation monitor shall be installed and operated at the auxiliary transmitter control point. The monitor, if taken from the main transmitter control point shall be reinstalled at that point immediately upon resumption of operation of the main transmitter.

(2) In all cases where the auxiliary transmitter and the main transmitter have the same location, the same modulation monitor may be used for monitoring both transmitters, provided the installation permits ready switching from one transmitter to the other.

6. Section 73.113 is amended by deleting subparagraph (a)(1)(iv)(b) and redesignating (a)(1)(iv)(c) as (a)(1)(iv)(b) and amending it to read as follows:

§ 73.113 Operating log.

(a) * * *

(1) * * *

(iv) * * *

(b) Antenna current or remote antenna current (for non-directional operation); common point current or remote common point current (for directional operation).

* * * * * * *

7. Sections 73.114(a)(1)(iii) and (a)(2)(ii) are amended to read as follows:

§ 73.114 Maintenance log.

(a) * * *

(1) * * *

(iii) A notation of the results of all frequency measurements, including date performed and description of method used.

* * * * * * *

(2) * * *

(i) Modulation monitor.

(ii) Final stage plate voltmeter.

(iii) Final stage plate ammeter.

(iv) Base current ammeter(s).

(v) Common point ammeter.

(vi) Antenna monitor.

* * * * * * *

8. Section 73.252 and headnote are amended to read as follows:

§ 73.252 Frequency measurements.

(a) The carrier frequency of the transmitter shall be measured as often as is necessary to ensure that it is maintained within the prescribed tolerance. However, in no event shall the interval between successive measurements exceed 31 days.

(b) The primary standard of frequency for radio frequency measurements shall be the national standard of frequency maintained by the National Bureau of Standards, Department of Commerce, Washington, D.C. The operating frequency of all radio stations will be determined by comparison with this standard or the standard signals of Stations WWV, WWVB, WWVH and WWVL of the National Bureau of Standards.

9. Section 73.255 is amended by adding a new paragraph (f) and redesignating existing paragraph (f) as paragraph (g) to read as follows:

§ 73.255 Auxiliary transmitter.

* * * * * * *

(f) The carrier frequency of the auxiliary transmitter shall be measured as often as is necessary to ensure that it is maintained within the prescribed tolerance. If the transmitter is used daily for a period of more than 31 days, the interval between successive measurements shall not exceed 31 days.

(g) The authorized operating power of an auxiliary transmitter may be less, but not more, than that of the regular transmitter. If it is less, the actual operating power is not limited to 105% of the authorized operating power of the auxiliary transmitter, but shall in no event exceed the authorized operating power of the regular transmitter.

§ 73.283 [Amended]

10. Section 73.283 is amended by deleting subparagraphs (a)(3)(iii) and (a)(6).

11. Sections 73.284(a)(2) and (a)(4) are amended to read as follows:

§ 73.284 Maintenance log.

(a) * * *

(2) A notation of the results of all frequency measurements, including date performed and description of method used.

* * * * * * *

(4) * * *

(i) Modulation monitor.

(ii) Final stage plate voltmeter.

(iii) Final stage plate ammeter.

(iv) Transmission line radio frequency voltage, current, or power meter.

* * * * * * *

12. Section 73.295 is amended by deleting subparagraph (f)(5) and (i), adding a new paragraph (g), redesignating existing paragraphs (g) and (h) as (h) and (i), to read as follows:

§ 73.295 Operation under Subsidiary Communications Authorizations.

* * * * * * *

(g) The frequency of each SCA subcarrier shall be measured as often as necessary to ensure that it is kept at all times within 500 Hz of the authorized frequency. However, in no event shall the interval between successive measurements exceed 31 days.

(h) Program and operating logs for SCA operation may be kept on special columns provided on the station's regular program and operating log sheets.

(i) Technical standards governing SCA operation (§ 73.319) shall be observed by all FM broadcasting stations engaging in such operation.

13. Section 73.297(b) is revised to read as follows:

§ 73.297 Stereophonic broadcasting.

* * * * * * *

(b) Each licensee or permittee engaging in stereophonic broadcasting shall measure the pilot subcarrier frequency as often as necessary to ensure that it is kept at all times within 2 Hz of the authorized frequency. However, in no event shall the interval between successive measurements exceed 31 days.

14. In § 73.317 subparagraphs (a)(10) and (c)(5) are amended to read as follows:

§ 73.317 Transmitters and associated equipment.

(a) * * *

(10) Means should be provided for connection and continuous operation of an approved modulation monitor.

* * * * * * *

(c) * * *

(5) The modulation monitor and radio frequency lines to the transmitter shall be thoroughly shielded.

* * * * * * *

15. Section 73.330 and headnote are amended to read as follows:

§ 73.330 Use of modulation monitors at auxiliary transmitters.

(a) The following shall govern the installation of approved modulation monitors at auxiliary transmitters:

(1) Installation of an approved modulation monitor at the location of the auxiliary transmitter, when different from that of the main transmitter, is optional with the licensee. However, when it is necessary to operate the auxiliary transmitter beyond two (2) calendar days, a modulation monitor shall be installed and operated at the auxiliary transmitter control point. The monitor, if taken from the main transmitter control point shall be reinstalled at that point immediately upon resumption of operation of the main transmitter.

(2) In all cases where the auixiliary transmitter and the main transmitter have the same location, the same modulation monitor may be used for monitoring both transmitters, provided the installation permits ready switching from one transmitter to the other.

§ 73.331 [Deleted]

16. Section 73.331 is deleted.

17. Section 73.552 and headnote are amended to read as follows:

§ 73.552 Frequency measurements.

(a) The carrier frequency of transmitters licensed for transmitter power output greater than 10 watts shall be measured as often as necessary to ensure that it is maintained within the prescribed tolerance. However, in no event shall the interval between successive measurements exceed 31 days.

(b) The primary standard of frequency for radio frequency measurements shall be the national standard of frequency maintained by the National Bureau of Standards, Department of Commerce, Washington, D.C. The operating frequency of all radio stations will be determined by comparison with this standard or the standard signals of Stations WWV, WWVB, WWVH and WWVL of the National Bureau of Standards.

(c) The licensee of each noncommercial educational FM broadcast station licensed for transmitter power output of 10 watts or less shall provide for the measurement of the station frequency by a means independent of the frequency control of the transmitter. The station frequency shall be measured (1) when the transmitter is initially installed, (2) at any time the frequency determining elements are changed, and (3) at any time the licensee may have reason to believe the frequency has shifted beyond the tolerance specified by the Commission's rules.

18. Section 73.555 is amended by adding a new paragraph (f) and redesignating existing paragraph (f) as paragraph (g) to read as follows:

§ 73.555 Auxiliary transmitter.

* * * * * * *

(f) The carrier frequency of the auxiliary transmitter shall be measured as often as is necessary to ensure that it is maintained within the prescribed tolerance. If the transmitter is used daily for a period of more than 31 days, the interval between successive measurements shall not exceed 31 days.

(g) The authorized operating power of an auxiliary transmitter may be less, but not more, than that of the regular transmitter. If it is less, the actual operating power is not limited to 105% of the authorized operating power of the auxiliary transmitter, but shall in no event exceed the authorized operating power of the regular transmitter.

§ 73.583 [Amended]

19. Section 73.583 is amended by deleting subparagraphs (a)(3)(iii) and (a)(6).

20. Sections 73.584(a)(2) and (a)(4) are amended to read as follows:

§ 73.584 Maintenance log.

(a) * * *

(2) A notation of the results of all frequency measurements, including date performed and description of method used.

* * * * * * *

(4) * * *

(i) Modulation monitor.

(ii) Final stage plate voltmeter.
(iii) Final stage plate ammeter.
(iv) Transmission line radio frequency voltage, current, or power meter.

* * * * * * *

21. Section 73.595 is amended by deleting subparagraph (f)(5) and (i), adding a new paragraph (g), redesignating existing paragraphs (g) and (h) as (h) and (i) to read as follows:

§ 73.595 Operating under Subsidiary Communications Authorizations.

* * * * * * *

(g) The frequency of each SCA subcarrier shall be measured as often as necessary to ensure that it is kept at all times within 500 Hz of the authorized frequency. However, in no event shall the interval between successive measurements exceed 31 days.

(h) Program and operating logs for SCA operation may be kept on special columns provided on the station's regular program and operating log sheets.

(i) Technical standards governing SCA operation (§ 73.319) shall be observed by all FM broadcasting stations engaging in such operation.

22. Section 73.596 is amended by revising paragraph (b) to read as follows:

§ 73.596 Stereophonic broadcasting.

* * * * * * *

(b) Each licensee or permittee engaging in stereophonic broadcasting shall measure the pilot subcarrier frequency as often as necessary to ensure that it is kept at all times within 2 Hz of the authorized frequency. However, in no event shall the interval between successive measurements exceed 31 days.

23. Section 73.672(a)(3) is amended and subparagraphs (i) and (ii) deleted to read as follows:

§ 73.672 Maintenance log.

(a) * * *

(3) An entry whenever frequency measurements are made including the date performed and description of method used.

* * * * * * *

24. In Section 73.687 subparagraph (e)(5) is amended to read as follows:

§ 73.687 Transmitters and associated equipment.

* * * * * * *

(e) * * *

(5) The modulation monitors and radio frequency lines to the transmitters shall be thoroughly shielded.

* * * * * * *

25. Section 73.690 is amended by deleting paragraphs (a) and (b), amending paragraph (c) and redesignating paragraphs (c) and (d) as (a) and (b) to read as follows:

§ 73.690 Frequency measurements.

(a) The visual carrier frequency and the difference between the visual carrier frequency and the center frequency of the aural transmitter shall be measured as often as necessary to ensure that they are maintained within the prescribed tolerance. However, in no event shall the interval between successive measurements exceed 31 days.

(b) The primary standard of frequency for radio frequency measurements shall be the national standard of frequency maintained by the National Bureau of Standards, Department of Commerce, Washington, D.C. The operating frequency of all radio stations will be determined by comparison with this standard or the standard signals of Stations WWV, WWVB, WWVH and WWVL of the National Bureau of Standards.

26. Section 73.692(a) and (b) and headnote are amended to read as follows:

§ 73.692 General requirements for type approval of modulation monitors.

(a) Any manufacturer desiring to submit a monitor for type approval shall supply the Commission with full specification details (two sworn copies) as well as the test data specified in § 73.694. If this information appears to meet the requirements of the rules shipping instructions will be issued to the manufacturer.

The shipping charges to and from the Laboratory at Laurel, Maryland, shall be paid for by the manufacturer. Approval of a monitor will only be given on the basis of the data obtained from the sample monitor submitted to the Commission for test.

(b) In approving a monitor upon the basis of tests conducted by the Laboratory, the Commission merely recognizes that the type of monitor has the inherent capability of functioning in compliance with the rules, if properly constructed, maintained, and operated.

* * * * * * *

§ 73.693 [Deleted]

27. Section 73.693 is deleted.

F.C.C. 73R-292

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RKO GENERAL, INC. (WNAC-TV), BOSTON, MASS. For Renewal of Broadcast License	Docket No. 18759 File No. BRCT-63
COMMUNITY BROADCASTING OF BOSTON, INC., BOSTON, MASS.	Docket No. 18760 File No. BPCT-4198
THE DUDLEY STATION CORP., BOSTON, MASS. For Construction Permit for New Television Broadcast Station	Docket No. 18761 File No. BPCT-4277

MEMORANDUM OPINION AND ORDER

(Adopted August 14, 1973; Released August 21, 1973)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK CONCURRING WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of RKO General, Inc., for renewal of license for Station WNAC-TV, Channel 7, Boston, Massachusetts, and those of Community Broadcasting of Boston, Inc. (Community) and The Dudley Station Corporation (Dudley) for authorization to construct a new television broadcast station on the same channel in the same community. The Commission, in its designation Order (34 FR 19852, 20 FCC 2d 846, released December 11, 1969), specified a number of issues, including a financial issue against Dudley. The Review Board subsequently specified a comparative Rule 1.65 issue against Dudley (34 FCC 2d 265, 24 RR 2d 16, released March 29, 1972). Now before the Review Board is a petition to enlarge issues, filed March 12, 1973, by Community,[1] requesting the addition of eighteen (18) issues against Dudley, including, *inter alia*, Rule 1.65, Rule 1.514, misrepresentation, lack of candor, financial and ineptness issues. Since some of these issues are based on the same factual allegations, they will be grouped together for consolidated consideration where appropriate.

TIMELINESS

2. At the outset, Community states that certain matters came to its attention at hearing sessions held between October 10, 1972 and November 30, 1972, and that these matters raise serious public interest questions concerning Dudley's qualifications (citing *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 8 RR 2d 611 (1966)). To show good cause for the late filing of its petition, Community contends that

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[1] Also before the Board are: (a) opposition, filed April 9, 1973, by Dudley; (b) comments of the Broadcast Bureau, filed April 6, 1973; (c) errata to (a), filed April 17, 1973; and (d) reply, filed April 18, 1973, by Community.

it had to wait until all 25 volumes of transcript were available; that Dudley filed a petition for leave to amend on January 19, 1973, which allegedly dealt with some of the problems which had come to light at the hearing; that it was awaiting Dudley's rebuttal showing; and that the petition to enlarge issues was filed "as expeditiously as possible" under the circumstances. Both Dudley and the Broadcast Bureau argue that Community's petition is grossly untimely and not supported by good cause. Dudley also argues that the *Edgefield-Saluda* case, cited by Community, does not support Community's request for enlargement of issues. The Board is of the view that Community has not shown good cause for the late filing of its petition to enlarge issues. See *Home Service Broadcasting Corporation*, 24 FCC 2d 192, 19 RR 2d 347 (1970), and cases cited therein; and our recent Memorandum Opinion and Order in this proceeding, —— FCC 2d ——, 27 RR 2d 1537 (1973). The hearing sessions upon which Community bases its allegations were completed on November 30, 1972, but Community did not file its petition to enlarge issues until March 12, 1973, approximately three and one-half months later. We do not find any of Community's explanations regarding the untimeliness of the instant petition persuasive. Moreover, the allegations concerning the so-called "inflammatory advertisement" (see paragraph 20, *infra*) have been a matter of public record since April of *1970*, and Community makes no attempt to explain why it waited almost three years before raising this matter. Finally, aside from the unexcused delay, the requests for issues do not, in our view, meet the *Edgefield-Saluda* test because the likelihood of proving the allegations are not so substantial as to outweigh the public interest benefits inherent in the orderly and fair administration of the Commission's business. *Cf. Valley Telecasting, Inc.* v. *FCC*, 119 U.S. App. D.C. 169, 338 F.2d 278, 3 RR 2d 2022 (1964).

ISSUES INVOLVING ANNE AND MARTIN PERETZ

3. Community first requests four issues relating to Anne Peretz, a creditor and Class B shareholder of Dudley, and Martin Peretz, her husband and also a Dudley creditor. The Peretzs agreed to lend Dudley $200,000 and executed a loan agreement under which they are jointly and severally liable. The terms of the loan agreement were filed with the Commission. In addition, non-voting Class B Dudley stock valued at approximately $20,000 was issued in the name of Anne Peretz and paid for by her attorney-in-fact, Edward Stack.[2] Community now alleges that substantial questions exist as to whether Mr. Peretz has an undisclosed beneficial interest in the Dudley stock issued in his wife's name; whether Mrs. Peretz testified candidly concerning her acquisition of Class B Dudley stock; whether Dudley misrepresented the fact that Mr. Peretz is jointly and severally liable under the terms of the $200,000 loan commitment; and whether Dudley has made misrepresentations concerning the above matters. In support of these allegations, Community asserts that Mrs. Peretz testified that she was not contacted by Dudley regarding the purchase of Dudley stock, but that Jerome Wiesner, a Dudley principal, had con-

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[2] The Board added a comparative Rule 1.65 issue to determine whether Dudley promptly notified the Commission of the sale of its Class B stock. See paragraph 1, *supra*.

tacted her husband; that she never saw the Class B Dudley stock purchase agreements, signed by Edward Stack;[3] that she never advised Stack that she desired to purchase Dudley stock; and that she was not aware whether her husband told Stack to purchase the stock on her behalf. According to Community, Mr. Peretz testified that he co-signed the $200,000 loan agreement with his wife, but did not intend to use his own funds; that he sent the Dudley stock prospectus to Stack; and that the stock was to be purchased in his wife's name and paid for from her assets. Furthermore, Community alleges, Edward Stack testified that Mrs. Peretz sent him a Dudley stock subscription form; that Mrs. Peretz was interested in the stock and he carried out her instructions; and that he was not involved in advising or negotiating with respect to this matter. Community also states that at the hearing it introduced into evidence a letter from Dudley's clerk to Stack and a memorandum of a telephone call between Stack and Dudley's President, both of which, Community argues, indicate that Mr. Peretz was the purchaser of the Class B stock issued in his wife's name.

4. Dudley, in opposition, argues that Mr. Peretz has no beneficial or other interest in the Dudley stock;[4] that the Peretzs rely almost totally on Mr. Stack in their financial matters; that the Peretzs did not pay much attention to the $200,000 loan agreement to Dudley; and that Stack had full authority to purchase Dudley stock for Mrs. Peretz. The Bureau opposes the addition of all issues relating to the Peretzs. According to the Bureau, the record makes clear that the loan commitment and the purchase of Dudley stock was not of great importance to the Peretzs due to their financial status and this explains why Mrs. Peretz was unsure and confused in many of her responses during cross-examination. The Bureau also argues that there is no evidence that Dudley was a party to the agreement between the Peretzs regarding the loan commitment and that Mrs. Peretz testified that she intended to honor the agreement from her own assets. In reply, Community asserts that serious questions were, in fact, raised by the testimonial inconsistencies between the witnesses and that Dudley filed a loan agreement with the Commission that was false.

5. It is the Review Board's opinion that all of the requested issues relating to the Peretzs should be denied. First, we do not believe that Community has raised a substantial question as to whether Mr. Peretz has a beneficial or any other interest in the Dudley stock issued in his wife's name. This contention was denied by the Peretzs and Mr. Stack in their testimony and the documents introduced by Community allegedly to the contrary do not establish that Mr. Peretz has an interest in Dudley stock, but merely that Dudley's principals may have believed that Mr. Peretz was purchasing the stock. In addition, Community does not allege nor does it appear that Dudley attempted to mislead the Commission with respect to this matter. Second, Community has not set forth any basis for adding a misrepresentation issue

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[3] In this respect, it is noted that Mrs. Peretz is a descendant of Edward Clark, the founder of the Singer Company, and that Mrs. Peretz owns approximately $6,000,000 in Singer stock. Edward Stack is the General Business Manager for Clark Estates, Inc., a corporation established to manage the family money. As Mrs. Peretz's attorney-in-fact, he manages nearly all of her money and is empowered to act without Mrs. Peretz's specific authorization.

[4] Attached to Dudley's opposition is an affidavit of Peretz in which he denies that he has any ownership interest, direct or indirect, in Dudley.

against Dudley regarding the $200,000 loan agreement. It appears that Dudley filed a document with the Commission, signed by the Peretzs, which indicated that the Peretzs were jointly and severally liable in the amount of $200,000; thus, legally, both the Peretzs were and are still liable to Dudley in the full amount of their loan commitment. The private agreement or arrangement between the Peretzs, *i.e.*, that the money was to come from her assets, is totally irrelevant to their legal obligation of joint and several liability and cannot be used as the basis for a misrepresentation issue. Community has not established that Dudley was a party to this agreement between the Peretzs or even knew of it. Third, we cannot agree with Community that the apparent conflict in the testimony of the witnesses warrants the addition of a lack of candor issue. Although Mrs. Peretz and Mr. Stack apparently gave conflicting testimony regarding the purchase of the Dudley stock, we believe that the matter is of questionable significance, that whatever conflicts that do exist resulted from confusion and misunderstanding rather than any intent to conceal or misrepresent facts, and, therefore, that this matter does not warrant further exploration in hearing. Community has failed to establish a motive for Mrs. Peretz's alleged lack of candor as well as the significance of this conflicting testimony, especially since Stack possessed the authority to purchase Dudley stock, as her attorney-in-fact, with or without her consent. Finally, since we will deny the first three requested issues relating to the Peretzs, we will also deny Community's request for a misrepresentation issue against Dudley.

ISSUES INVOLVING JEROME WIESNER

6. Community next requests that Rule 1.514, 1.65 and misrepresentation issues be added against Dudley on the ground that it failed to report in its application the broadcast interests of Jerome Wiesner, a 7% shareholder and director of Dudley, and also failed to timely amend its application to report broadcast interests of Wiesner which were acquired subsequently. Specifically, Community alleges that at the October, 1972, hearing, Wiesner testified and revealed for the first time that Adams-Russell Company, a company in which he was a director and 1% shareholder,[5] owns Aurovideo, Inc. which, in turn, owns CATV and broadcast interests; that Aurovideo, Inc. had acquired broadcast interests prior to the filing of the Dudley application;[6] that Wiesner told Dudley's President, Bertram Lee, about these interests in the late summer of 1972; and that Dudley did not amend its application to report the broadcast interests of Aurovideo Inc. until January 19, 1973. Dudley opposes all the requested issues and argues that it voluntarily disclosed Wiesner's broadcast interests at the hearing in October, 1972; that Wiesner was not aware of Adams-Russell's broadcast interests until the summer of 1972; and that he was not familiar with or personally involved in Aurovideo. Dudley also states that Wiesner has resigned from Adams-Russell's Board of Directors and previously represented that he would withdraw from

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[5] Community does not contest that Wiesner's 1% interest in Adams-Russell was reported in Dudley's application.

[6] Dudley filed its application on July 8, 1969, and Aurovideo acquired its first broadcast interest in February, 1969.

Adams-Russell should Dudley be successful in this proceeding. The Bureau argues that there is no indication that Dudley attempted to conceal Wiesner's broadcast interests but that the allegations may be relevant on a comparative basis.

7. The Review Board will deny all of the requested issues relating to Dr. Wiesner's interest in Adams-Russell and Aurovideo. In light of Wiesner's insignificant interest in Adams-Russell (*i.e.*, 1%), as well as Dudley's voluntary disclosure of Aurovideo's communications interests at the hearing, and in the amendment of January, 1973, we do not believe that any serious questions have been raised as to the applicant's qualifications which warrant the addition of the requested Rule 1.514, 1.65 and misrepresentation issues. See *Auburn Publishing Company*, 34 FCC 2d 134, 24 RR 2d 29 (1972); *Harvit Broadcasting Corp.*, 32 FCC 2d 656, 23 RR 2d 328 (1971). In our view, Dudley's failures in this regard are "*de minimis* and not of sufficient magnitude to require an evidentiary inquiry." *Southland, Inc.*, 37 FCC 2d 125, 127, 25 RR 2d 186, 191 (1972).

DUDLEY'S EQUIPMENT PROPOSAL

8. Community argues that at the hearing Dudley drastically reduced its cost estimates for construction and three months operation, and that a serious question has, therefore, been raised with respect to the adequacy of Dudley's financial proposal, citing *Kittyhawk Broadcasting Corp.*, 8 FCC 2d 839, 10 RR 2d 628 (1967). Specifically, Community alleges that at the time this case was designated for hearing, Dudley proposed to spend $4,794,738 for these expenses, and, at the hearing, proposed to spend only $3,689,600; that Dudley's studio costs were cut from $500,000 to $180,000; and that Community should have an opportunity to inquire into this matter. Dudley and the Bureau oppose the requested issue on the ground that the allegations are totally inadequate to support Community's request. Dudley asserts that its cost estimates at the time of designation are irrelevant because it amended its application on March 27, 1972, to alter its proposal and Community had approximately one year to raise any questions concerning these estimates. In reply, Community argues that its cost projections have increased by nearly one million dollars since designation while Dudley's have decreased by the same amount, and that these changes demonstrate the need for inquiry into this matter.

9. The Board is of the view that the requested issue should be denied. We agree with Dudley and the Bureau that Community's allegations are totally inadequate to support the requested issue since they are highly speculative and fail to set forth any factual basis for challenging Dudley's cost estimates; as such, they do not meet the requirements of Section 1.229(c) of the Commission's Rules.[7] See *John H. Spottswood*, 32 FCC 2d 487, 23 RR 2d 248 (1971), and cases cited therein. See also *Lake Erie Broadcasting Co.*, 33 FCC 2d 1009, 23 RR 2d 1223 (1972). Moreover, the fact that Community's estimated costs exceed

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[7] Section 1.229(c) provides that motions to enlarge, change, or delete issues shall contain specific allegations of fact sufficient to support the action requested and shall be supported by affidavits of a person or persons having personal knowledge thereof.

those of Dudley does not, in and of itself, convince us that an inquiry into this matter is warranted. A petitioner must raise a substantial question as to whether an applicant's cost estimates are unrealistic. *Radio Geneva, Inc.*, FCC 73R-272, —— FCC 2d ——, released July 25, 1973.[8]

ISSUES INVOLVING THE MORGAN STOCK LOAN

10. Community requests that misrepresentation, Rule 1.514 and Rule 1.65 issues be added against Dudley on the ground that Dudley made a material misrepresentation to the Commission in an amendment to its application, dated October 22, 1969. In support, Community alleges that Dr. Henry M. Morgan, a Dudley shareholder and director, lent Dudley $1,000; that Dudley represented in the October, 1969 amendment that the loan was due in April, 1970, at which time "the loan will be converted into equity in the corporation, with Mr. Morgan receiving 400 shares of [Dudley] stock"; that Dr. Morgan testified that the debt is still owed him and he never received any stock; and that Dudley never amended its application to change this representation. Community further argues that Bertram Lee, Dudley's President, testified that it was never Dudley's intention to convert the loan to stock and that the inconsistency resulted from confusion in communications between Dudley and its Washington counsel. Dudley, in opposition, concedes the accuracy of Community's factual allegations, but argues that there was no agreement that Morgan was to receive Dudley stock; that the loan was interest bearing; and "through transpositional inadvertance, Dudley made an imprecise representation to the Commission." The Bureau opposes the addition of the requested issues on a disqualifying basis, arguing that the matter has been fully explored in hearing and that no motive for concealment has been demonstrated. The Bureau does not, however, oppose consideration of this matter on a comparative basis. Community, in reply, maintains that Dudley's explanation is inadequate, especially since Bertram Lee signed the amendment and Dudley has never amended to delete this representation.

11. In the Board's view, Community's allegations with respect to the Morgan loan commitment do not warrant the addition of misrepresentation, Rule 1.514 or Rule 1.65 issues against Dudley in this proceeding. It does not appear that the representation made in the October, 1969, amendment in any way affects Dudley's financial qualifications nor does it appear that any intent or motive to conceal has been demonstrated which requires the addition of Rule 1.514 or 1.65 issues against Dudley. See *Auburn Publishing Company, supra; Harvit Broadcasting Corp., supra.* In our opinion, the matter is of minor significance and does not require further exploration in hearing. See *Southland, Inc., supra.* The requested issues will therefore be denied.

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[8] In *Kittyhawk Broadcasting Corp.*, relied upon by petitioner, the Board added an adequacy of equipment issue since it could not resolve the issue on the basis of the pleadings. Here, however, we are concerned with Dudley's cost estimates and Community has not raised a question concerning the adequacy of Dudley's estimates.

ISSUES INVOLVING DUDLEY'S CLASS B STOCK PLAN

12. In Exhibit 11 to its application,[9] Dudley proposed to sell its Class B non-voting stock as follows: one-third to the station's employees other than directors who owned Class A stock; one-third to be held for the benefit of minority group non-profit enterprises; and one-third to members of the community in small blocks. Based on the testimony of several Dudley principals, Community now alleges that it was never Dudley's intention to implement this proposal, and, as a result, misrepresentation, Rule 1.514, 1.65 and lack of candor issues should be added against Dudley. In support, Community alleges that Dudley has sold a substantial amount of Class B stock to people who are not included in the above three categories including several Class A stockholders; that several of Dudley's principals testified regarding the stock plan and could not recall whether the Board of Directors had ever approved the plan; that the minutes of Dudley's Board of Directors confirm that such a plan was never adopted by the Board; and that Bertram Lee, Dudley's President, testified that Exhibit 11 had been deleted by an amendment dated November 29, 1969,[10] but then changed his testimony and stated that the amendment was "sort of a supplemental thing . . . It was not eliminating one for the other." Community insists that serious questions have been raised which warrant the addition of the requested issues.

13. Dudley, in opposition, argues that Class B non-voting stock was authorized to raise money to finance the Dudley application; that it was the general intention of Dudley's directors to issue Class B non-voting stock to employees and non-profit organizations;[11] and that the minutes of Dudley's Board of Directors confirm "that the plan as such and as set forth in Exhibit No. 11 of Dudley's original application . . . was not adopted as such." Dudley also argues that it amended its application on November 29, 1969, to substitute a new Section IV which made no mention of the plan set forth in Exhibit 11 and that in an amendment filed March 27, 1972, Dudley indicated that it would offer community groups and other persons additional shares of Class B non-voting stock. The Bureau opposes the addition of all the requested issues, contending that Dudley has amended its application and no longer relies on the Class B stock plan proposed in its application. In reply, Community argues that Dudley represented that all of its Class B stock was to be sold to only three specific groups, and, to date, none of its Class B stock has been sold to anyone represented in these three groups. Community also contends that Dudley has failed to explain this matter as well as the inconsistencies in the testimony of its principals, and that the addition of the requested issues is therefore warranted.

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[9] Exhibit 11 was submitted in response to Section IV–B, Part VII, Question 27 of FCC Form 301, the application form, which states that the applicant may submit any additional information which is necessary adequately to describe or to present fairly its services and operations in relation to the public interest.

[10] On November 29, 1969, Dudley filed an amendment to its application which provided, *inter alia*, that:

> The attached Section IV of Form 301 should be *substituted* for the Section IV of the application presently on file with the Commission. (Emphasis supplied.)

The new Section IV did not mention the Class B stock plan and did not respond to Question 27.

[11] While several Dudley directors testified that the plan as set forth in Exhibit 11 was discussed, there is no indication that the plan was ever adopted by the Board of Directors.

14. The Review Board is of the view that all of the requested issues relating to Dudley's Class B stock plan should be denied. By way of background, we note that Dudley filed its application for Channel 7 on July 8, 1969, and amended its application on November 29, 1969, to *substitute* a new Section IV. See note 10, *supra*. On December 11, 1969, the Commission designated Dudley's application for hearing along with the mutually exclusive applications of RKO General, Inc. and Community (see paragraph 1, *supra*). In our view, Dudley's November 29, 1969 amendment did, in fact, substitute a new Section IV for the original Section IV, and, thus, Dudley had eliminated the Class B stock plan prior to designation and four months after filing its application. It appears, from the testimony of Dudley's directors, that the directors discussed the matter of offering Class B non-voting stock to employees and community groups and had at least a general intention to adopt such a plan, although the plan was never officially adopted. Furthermore, the Board finds Dudley's explanation regarding its Class B non-voting stock a reasonable explanation of the matters raised in Community's petition. In light of the above, it does not appear that Dudley intended to mislead the Commission regarding its Class B stock plan and, in our view, the requested misrepresentation issue should be denied. We will deny, also, the requested Rule 1.514 and 1.65 issues since no intent to mislead the Commission has been demonstrated and the matters raised are of minor significance. See *Auburn Publishing Company*, *supra; Southland, Inc.*, *supra.* Finally, with respect to the requested lack of candor issue based on Bertram Lee's testimony, it appears that Mr. Lee's testimony was inconsistent; however, since no motive or intent to mislead has been demonstrated, it appears that the inconsistency was merely the result of a misunderstanding, and we do not believe that Mr. Lee's testimony warrants the addition of a lack of candor issue.

ISSUE INVOLVING THOMAS BROWN

15. Thomas J. Brown, a 7% stockholder, director and proposed advertising Promotion Director of Dudley, testified on October 24, 1972, and Community alleges that Brown was lacking in candor in his testimony. The facts supporting Community's request are not disputed and are based on the following cross-examination of Brown conducted by counsel for Community:

Q. Are you a member of the Roxbury Multi-Service Center?
A. No.
Q. Are you familiar with that organization at all?
A. Yes.
Q. Is that affiliated with any political organization?
A. Since I am not a member of the organization, I don't know.

Community alleges that Brown was a director of the Roxbury Multi-Service Center (Roxbury) from 1968 to 1969, and, therefore, that a serious question is raised as to the candor of Mr. Brown. Both Dudley and the Bureau oppose the addition of the requested issue.

16. In our opinion, Community has not raised any question concerning Brown's candor at the hearing. Compare *Orange County Broadcasting Co.*, 37 FCC 2d 794, 25 RR 2d 619 (1972), which is

mistakenly relied upon by Community in its petition.[12] Brown testified that he was not a member of Roxbury, that he was familiar with the organization, and that he did not know if Roxbury was affiliated with any political organization since he was not a member. Thus, all of Community's questions were framed and worded in terms of Brown's *present* affiliation with or *present* knowledge of Roxbury. Brown was not questioned concerning his *past* affiliation with or *past* knowledge of the organization. In our view, Brown responded candidly to the questions posed by Community. His failure to volunteer additional information concerning his past affiliation with Roxbury does not, in our opinion, reflect adversely on his candor. In addition, since Brown had not been affiliated with Roxbury since 1969, which is four years ago, we do not find his response regarding Roxbury's political affiliations unreasonable under the circumstances or lacking in candor. The requested issue will therefore be denied.

MISCELLANEOUS RULE 1.514 AND 1.65 ALLEGATIONS

17. Community next alleges that Dudley violated: (a) Rules 1.514 and 1.65 by failing to ascertain the business, financial and other broadcast interests of certain principals; and (b) Rule 1.65 by failing to report certain changed information in a timely manner. With respect to (a), Community alleges the following: that Anne Peretz testified that she was not requested to supply any information regarding her business, financial or other broadcast interests; that Harry Levine, a Dudley stockholder, testified that no one asked him to supply any business or financial information; and that Henry W. Kendall, also a Dudley stockholder, testified that he could not recall being asked for any business or financial information. As to (b), Community alleges that Dudley filed an amendment to its application on January 19, 1973, and that an examination of the amendment reveals that Dudley violated Rule 1.65 on "numerous" occasions. Community does not specify the alleged violations, but rather directs the Board's attention to Tables I, II, and III of the January 19, 1973 amendment, a copy of which is attached to Community's petition. Both Dudley and the Bureau oppose the addition of Rule 1.514 and 1.65 issues arising from either Dudley's alleged failure to ascertain the business interests of its principals or Dudley's recent amendment. Dudley argues that Bertram Lee testified that he asked for the business and financial interests of Kendall and Peretz by communicating with their respective attorneys-in-fact and also requested such information from Levine. In addition, the Bureau points out that the allegations are vague, indefinite and do not comply with the specificity requirements of Rule 1.229(c).

18. The Board is of the view that all of the requested issues should be denied. There is no merit to the allegations regarding Dudley's failure to ascertain the business, financial and other broadcast interests of its principals. Although Lee did not contact Peretz or Kendall personally, it does appear that he contacted their attorneys-in-fact for the specific purpose of obtaining business and financial information. Fur-

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[12] In *Orange County*, the Board added a lack of candor issue against an applicant where it appeared that the applicant had submitted to the Commission what purported to be a *bona fide* loan commitment but which was, in fact, not a commitment by the bank.

thermore, Community does not allege that Dudley violated Rule 1.514 or 1.65 by failing to report the various business interests of Peretz, Kendall or Levine, but merely that Rule 1.514 and 1.65 issues should be added to determine whether these Rules were violated "due to Dudley's failure to even ask for essential information required in its application." Thus, it appears that Community has also failed to comply with Rule 1.229(c), which requires petitions to enlarge issues to contain *specific* allegations of fact. Vague allegations that an applicant has possibly violated a Commission Rule will not suffice. Likewise, Community's allegations regarding Dudley's January 19, 1973, amendment also fail to comply with the specificity requirement of Rule 1.229(c). Community's petition does not allege specific facts, but rather, places the entire burden of ascertaining these facts upon the Board. Such a procedure is "at odds" with Rule 1.229(c), *Atlantic Broadcasting Co.*, 5 FCC 2d 161, 165, 8 RR 2d 791, 796, review granted in part and denied in part 5 FCC 2d 717, 8 RR 2d 991 (1966), and therefore wholly unacceptable.

ISSUE INVOLVING BERTRAM LEE

19. According to Community, the record in this proceeding establishes a clear pattern of inadvertence and carelessness on the part of Dudley's President, Bertram Lee, which warrants the addition of an ineptness issue against Dudley. In support of its request, Community alleges that Dr. Wiesner told Lee about his other broadcast interests in the late summer of 1972, but Lee never reported these interests until January of 1973; that Lee made a practice of never asking stockholders for information about their financial and business interests; that Lee failed to report some of his own business interests; and that Lee was responsible for the numerous Rule 1.65 and 1.514 violations cited by Community in the instant petition. Both Dudley and the Bureau oppose the addition of the requested ineptness issue. The Bureau argues that Community's allegations are totally lacking in factual support and cannot form the basis for an ineptness issue. The Review Board will deny the requested issue. In our view, Community has not established a pattern of carelessness or inadvertence on the part of either Lee or Dudley sufficient to warrant the addition of an ineptness issue against Dudley. See *Alvin L. Korngold*, 40 FCC 2d 536, 27 RR 2d 78 (1973); *Folkways Broadcasting Co. Inc.*, 26 FCC 2d 175, 20 RR 2d 528 (1970), and cases cited therein. Moreover, Community's requested ineptness issue is, in effect, a cumulative issue based upon its requests for the other issues relating to Dudley's qualifications; therefore, it must be denied since we have denied Community's requests for each of the foregoing issues. *Cf. Edward G. Atsinger*, 29 FCC 2d 443, 21 RR 2d 1039 (1971).

THE "INFLAMMATORY ADVERTISEMENT" MATTER

20. Community's final request is based on the fact that in April of 1970, three of Dudley's principals, Bertram Lee, Henry Hampton, and Ruth Batson, sponsored a full page advertisement in the *Boston Globe*, which according to petitioner, raises serious questions concern-

ing their qualifications to be Commission licensees. Community argues that the advertisement made allegations to the effect that the government is behind a national effort to repress blacks and that the courts are instruments of repression.[13] Community requests that the effect of this advertisement on the character qualifications of these stockholders be fully explored in hearing. Both Dudley and the Bureau oppose the addition of the requested issue. Dudley argues that all three principals are respected members of the Boston community and that petitioner's allegations are nothing more than an attempt at character assassination. The Bureau argues that the three Dudley principals who sponsored the advertisement were merely exercising their right to freedom of speech, which is guaranteed by the First Amendment to the Constitution. In reply, Community argues that the inflammatory statement was sponsored by three Dudley principals who will be integrated into the station operation. Community insists that the advertisement raises serious questions concerning the "character, reliability and judgment" of these principals. The Review Board will deny the requested issue. It is well established that the mere expression of opinion or belief by a broadcast applicant or its principals is not a proper matter for Commission inquiry. "The Commission is wisely forbidden from choosing 'among applicants upon the basis of their political, economic or religious views . . .' " *Brandywine-Maine Line Radio, Inc.*, 4 RR 2d 697, 699 (1965), quoting *NBC* v. *U.S.*, 319 U.S. 190, 216 (1943). The question is whether the applicant will afford others who may not share the applicant's views an opportunity to express their views over the proposed broadcast facility and evidence of past *conduct*—but not mere expression of belief—is relevant in this regard. See *WBNX Broadcasting Co. Inc.*, 4 RR 242 (1948). Here, however, Community has not alleged facts showing questionable past *conduct* on the part of Dudley's shareholders, but rather, expressions of *opinion* or *belief* regarding racial relations. In our opinion, this is wholly insufficient to warrant an evidentiary inquiry.

21. Finally, the Board *again* suggests to the parties that they may wish to reappraise their approach to this proceeding, with the understanding that the ultimate determination will be based on the facts of record rather than arguments, allegations and innuendo contained in interlocutory pleadings. The vast number of pleadings filed in this proceeding frustrates an orderly and efficient administrative process and causes unnecessary delay. See our prior Memorandum Opinion and Order in this proceeding, 34 FCC 2d 736, 24 RR 2d 200 (1972). See also *WIOO, Inc.*, 40 FCC 2d 217, 26 RR 2d 1611 (1973).

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[13] The Board does not believe that any useful purpose would be served by quoting at length from the advertisement in question. However, the following language may be helpful in understanding the thrust of the advertisement:

> "We are targets of Repression at all levels. Blacks who speak out and act against injustices are harassed."
>
> "Police assault and kill Blacks confident that they will not be brought to account."
>
> "Urban Renewal and highway bulldozers are 'bombing' large sections of our community."

The advertisement urged all blacks to speak out and defend the rights of those being harassed, support black organizations and call radio talk shows and express their views.

22. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed March 12, 1973, by Community Broadcasting of Boston, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

BOARD MEMBER PINCOCK CONCURRING IN THE RESULT

Having found that the petition to enlarge was grossly late and with no showing of good cause nor overriding public interest consideration, I would do no more than dismiss the petition.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
HORACE P. ROWLEY, III, NEW YORK, N.Y.
To Reverse Staff Action Dismissing a
Petition for Rehearing

AUGUST 16, 1973.

HORACE P. ROWLEY, III, Esq.,
416 East 81st Street,
New York, N.Y.

DEAR MR. ROWLEY: Your letter of August 2, 1973 to the Secretary of the Commission has been referred to this office for reply. You request the Commission to "reverse the action of the Complaints and Compliance Division dated July 30, 1973 dismissing a petition for rehearing."

Our July 30 letter to you did not dismiss a petition for rehearing, but dismissed your request of July 22 to "extend from July 26 to August 27 the deadline for filing a petition for rehearing" in connection with your complaint against television station WNET, New York, New York. This request was dismissed pursuant to the second sentence of Section 1.115(g), which states: "No petition requesting reconsideration of an order when denies an application for review without specifying reasons therefor will be entertained."

You now claim that the Commission's June 26 Order denying your Application for Review of the Bureau's ruling of January 30, 1973 did specify reasons.

Assuming *arguendo* that your interpretation of the June 26 Order is correct, we did not in any event have authority to extend the time for filing a petition for rehearing. The requirements for filing such petition are set forth in Section 405 of the Communications Act of 1934, as amended (47 USC 405). The pertinent portion thereof states: "A petition for rehearing must be filed within 30 days from the date upon which public notice is given of the order, decision, report, or action complained of." The Commission's Order denying your Application for Review was adopted on June 21 and released June 26. Therefore, pursuant to Section 405, a petition for rehearing was required by statute to be filed by July 26, 1973. Since this is a provision of the Communications Act, neither the Commission nor the Broadcast Bureau has any authority to waive the requirement.

In the foregoing circumstances your request for an extention of time for filing a petition for rehearing could not have been granted by the Commission. It might also be noted, as pointed out in our July 30 letter to you, that your July 22 request was not received in the Commission until July 25 and in the Complaints and Compliance Division until July 26.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINBURG,
Acting Chief, Complaints and Compliance Division,
for Chief, Broadcast Bureau.

F.C.C. 73-844

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice to
RUSH BROADCASTING CORP., LICENSEE OF STATION WRBT-TV, BATON ROUGE, LA.
Of Apparent Liability for Forfeiture

AUGUST 2, 1973.

RUSH BROADCASTING CORP.,
Licensee of Station WRBT-TV, 5220 Essen Lane, Post Office Box 14685, Baton Rouge, La.

GENTLEMEN: The Commission has on this date issued to you a Notice of Apparent Liability for forfeiture for violation of the Commission's logging Rules in connection with the broadcast of a program broadcast by Station WRBT-TV and sponsored by National Chinchilla, Inc. That program, according to the logs you submitted for the dates of the program's broadcast, was entitled "National Chinchilla" and was presented on seven occasions from January to August, 1972. The Notice dealt only with those violations occurring on August 19 and 27, 1972.

This same program has come to our attention recently in *Weigel Broadcasting Co.*, FCC 73-565-566 (May 23, 1973). Even though the National Association of Broadcasters Television Code Authority approved this program as meeting its standards for broadcast,[1] the Commission considers this program to be a program-length commercial, and therefore, violative of its policies, in this area. The Notice of Apparent Liability is concerned with the apparent violations of the Commission's logging Rules and although those apparent violations attended the broadcast of the program questioned herein, the apparent violations asserted in the Notice were not premised upon the broadcast of this program per se. The Commission, nevertheless, believes that the broadcast of any program-length commercial is a serious matter, entirely aside from the violations of the logging Rules which resulted from broadcasts involved here.

It was this same concern that caused the Commission to issue the Public Notice, titled "Program-Length Commercials" (FCC 73-215), 39 FCC 2d 1062, 26 RR 2d 1023, sent to all our broadcast licensees on February 22, 1973. In that Public Notice, we stated:

> Program-length commercials raise three basic problems. Of primary concern is that such programs may exhibit a pattern of subordinating programming in the public interest to programming in the interest of salability. In addition, a

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[1] The script of the program questioned herein bears the following tag line: "MEDIUM: 30:00 TV Program/Revision #9—Final/Approved by NAB 4/17/70." This particular script was provided through the Jackson Waterbury & Co. agency, as was the script in *Weigel Broadcasting Co., supra,* text.

> program-length commercial is almost always inconsistent with the licensee's representations to the Commission as to the maximum amount of commercial matter that will be broadcast in a given clock hour. Finally, there are usually logging violations involved . . .

We stated further:

> In the past, the broadcast of such programs has resulted in issuance of letters of admonition and/or relatively small forfeitures based on the logging violation aspect of the cases. However, the Commission continues to receive evidence that some stations still are broadcasting programs which, because of the interweaving of "entertainment" or "informational" content with promotion of the advertisers' products, are program-length commercials.
>
> This constitutes a reminder that the Commission considers the broadcast of such programs to involve a serious dereliction of duty on the part of the licensee, and a notice to all licensees that the Commission intends in the future to consider imposition of sanctions which it believes will be more effective in bringing about a discontinuance of the practice.

The Commission has found that the questioned program constitutes a program-length commercial since the entire broadcast appears to have been presented to promote the products and services of National Chinchilla, Inc., the program's sponsor, and that any entertainment or informational aspects the program may have contained were wholly incidental to the commercial promotions contained therein.

Although the broadcasts of the program-length chinchilla commercials on WRBT-TV ceased before the above Notice was issued, you had been put on notice by many Commission rulings of our policies with respect to this subject.[2] Nevertheless, it appears that by broadcasting the identical half-hour presentation seven times during the above-referenced period, you exhibited a pattern of subordinating programming in the public interest to programming in the interest of salability, and that by broadcasting at least 29 minutes of commercial advertising in a single hour each week, you disregarded the representation made in your last renewal application that you would normally present no more than 16 minutes of advertising per hour.

The Commission also notes that you were extremely dilatory in responding to the Commission's inquiry in this matter. The initial letter of inquiry was dated November 27, 1972 and requested a response within twenty days. By letter dated December 8, your counsel stated that you had not received the Commission's letter until December 6, and requested an extension of time for response until January 8, based on the necessity for you to obtain a copy of the script of the program from the advertising agency. However, the Commission found it necessary to send another letter on May 14, 1973, stating that the licensee still had not responded and that "Continued failure to respond to Commission inquiries may subject you to sanctions." The licensee's response was ultimately filed on May 18, 1973, more than five months after the Commission's original inquiry and more than four months after the expiration of the extension the licensee sought.

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[2] Commission rulings include the following: *Columbus Broadcasting Company, Inc.*, 25 FCC 2d 56 (1970); *Multimedia, Inc.*, 25 FCC 2d 59 (1970); *KCOP-TV, Inc.*, 24 FCC 2d 149 (1970); *Dena Pictures, Inc.*, 31 FCC 2d 206 (1971); and *National Broadcasting Company*, 29 FCC 2d 67 (1971).

Section 308(b) of the Communications Act of 1934, as amended, states in part:

> The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of facts to enable it to determine whether such original applications should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

The Commission regards such a long delay in responding to inquiry as reflecting upon the responsibility of a licensee.

In view of the foregoing, you are requested within twenty days of the date of this letter to submit a statement as to your future policies and procedures regarding the broadcast of program-length commercials. Your response, along with all other information relating to your qualifications to remain a licensee, will be considered in connection with your pending renewal application.

Commissioners H. Rex Lee and Reid absent.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-843

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notice to
RUSH BROADCASTING CORP., LICENSEE OF STATION WRBT-TV, BATON ROUGE, LA.
Of Apparent Liability for Forfeiture

AUGUST 2, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

RUSH BROADCASTING CORP.,
Licensee of Station WRBT-TV, 5220 Essen Lane, Post Office Box 14685, Baton Rouge, La.

GENTLEMEN: This letter constitutes Notice of Apparent Liability for forfeiture, issued pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

On August 19 and 27, 1972, WRBT-TV broadcast a program which the program logs identify as "National Chinchilla." The same program, approximately 29 minutes in length, was also presented on the following dates in 1972: January 15, 22, and 29; February 5, and March 26. The program was sponsored by a firm doing business as National Chinchilla, Incorporated, located in Shawnee Mission, Kansas. During a segment of the program, the sponsor characterizes its business as that of a national wholesale chinchilla distributor which sells chinchillas exclusively through authorized dealers to individuals established in the chinchilla ranching business and to individuals who are interested in purchasing chinchillas and assists them in establishing the proper environment in which the company's clients can breed and raise the chinchillas for the purpose of marketing.

Licensee's response to the Commission's inquiry in this matter disclosed that the direct sources of the program's continuity were the advertising agencies, Meeker Company and Sher & Jones, both of which maintain offices in Kansas City, Missouri. For each of the half-hour broadcasts, the station received a fee which ranged from $180 to $250. Licensee additionally noted that the program presented by the station received the approval of the National Association of Broadcasters Television Code Authority as meeting its standards for broadcast. Pursuant to the Commission's request, program logs for each day "National Chinchilla" was broadcast were submitted.

The logs disclosed that although the duration of the program itself was logged as 29 minutes, there was no entry in the column titled "Duration" which was normally used by the licensee to show the length of commercial matter pursuant to Section 73.670(a)(2)(ii) of the Rules, nor did the logs comply with the alternative requirement of

Section 73.670(a)(2)(ii) that an entry be made "showing the total duration of commercial matter in each hourly time segment (beginning on the hour) . . ." Under the log column titled "Type" in which commercial announcements were logged as "CM"—apparently meaning "Commercial Matter"—the chinchilla program was designated only as "E"—apparently meaning "Entertainment."

Although the licensee did not log any part of the program as commercial matter, the script of the program itself clearly disclosed that the final nine minutes were intended to consist of a commercial message.[1]

Moreover, not only was this final segment commercial, but the entire 29-minute program constituted a program-length commercial and accordingly should have been so logged, as we found with respect to the same program when broadcast by Station WCIU-TV. See *Weigel Broadcasting Co.*, FCC 73-565-566, May 23, 1973, where the sponsor and scripts were identical to those here involved. The script of the program indicates that in fact the content of the so-called noncommercial and the admittedly commercial portions of the program were so closely related and interwoven that the entire program should have been considered as a commercial message. The purportedly noncommercial segment is devoted to a discussion of the South American origins of the chinchilla; general acceptance of the chinchilla's pelt as the source of "luxurious fur" known for its beauty, value as an economic commodity, and wearability in the form of outerwear; statements that the fur cannot be reproduced synthetically; and the expectation of monetary enrichment to chinchilla ranchers, both professional and amateur, created by the demand for the animal's pelt by manufacturers of chinchilla fur coats. There are, additionally, numerous direct and indirect references to the fact that demand for chinchilla fur exceeds the available supply and that chinchilla ranchers are engaged in a lucrative enterprise. The major portion of this segment consists of a discussion between the program's narrator and Mr. Tony Busch, a fur grader associated with the Blend-Trast Grading System, who is characterized by the program's narrator as "a recognized authority on chinchilla breeding and ranching." The discussion deals with the animal and its physical attributes, the raising and breeding processes, including the proper environment in which the chinchilla should be raised and bred, the equipment needed to effectuate such processes, and the procedures chinchilla ranchers should follow to ensure salability of the chinchilla. This portion of the program consumes approximately 20 minutes.

There follows a nine-minute segment which is identified in the script as a commercial message promoting the services of the sponsor, National Chinchilla, Inc. This segment features the announcer and Robert Bouckhout of National Chinchilla, Inc. Much of this presentation repeats what had been stated about chinchilla ranching during the purportedly non-commercial segment of the program while asserting that the sponsor employs only those methods that are con-

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[1] In the middle of page 14, there is the notation in capital letters, "START OF COMMERCIAL," followed by an invitation to "watch this message from National Chinchilla, Incorporated," and then another capitalized notation designating the remainder of the program as "COMMERCIAL SEGMENT."

sidered optimal for raising and breeding chinchilla consistent with the information presented during the initial twenty-minute portion of the program. The particular focus of the admittedly commercial segment is upon the high quality of animals bred and raised by the sponsor; in particular, requests are made alternatively by the narrator and Bouckhout that members of the viewing audience interested in pursuing chinchilla ranching as a business make contact with the station to arrange a visit with the company's representative, who would explain the company's services and propose the possibility of financing an investment in such services offered by National Chinchilla, Inc.

Based on these disclosures, and as noted above, it appears that this entire program, "National Chinchilla" constituted an advertisement for National Chinchilla, Inc., and that all 29 minutes of the program must be considered as commercial. The program's format, the utilization of the company's product in the program's title, the employment of the same individual to narrate the initial 20-minute segment and to engage in the discussion during the final 9-minute segment, and the statements made throughout the program representing chinchilla ranching as monetarily lucrative, all appear to be intended to induce viewers to become customers of National Chinchilla, Inc. Besides promoting National Chinchilla, Inc., by name, the final 9-minute segment emphasizes that the company employs only those raising and breeding methods that had been described in the initial segment as most suitable for producing a readily marketable chinchilla fur of high quality. One additional fact should be noted as further indicating that the program was broadcast as a commercial message in its entirety: on each date "National Chinchilla" was presented by WRBT-TV, the station broadcast the identical program without change. When all of the circumstances are considered, it appears that any informational or entertainment aspects the program may contain are wholly incidential to the commercial promotion of National Chinchilla, Inc., and that the non-commercial and commercial portions are so intertwined with the promotion of the company's services that the entire program must be considered a program-length commercial and should have been logged as such.[2]

The Commission has considered the circumstances of this case and has determined that pursuant to Section 503(b)(1)(B) of the Communications Act of 1934, as amended, you have incurred an apparent liability for forfeiture in the amount of two thousand dollars ($2,000) for willfully or repeatedly failing to observe Section 73.607(a)(2)(ii) of the Commission's Rules in logging the broadcasts of the above-described program. This proceeding is confined to the violations which occurred within one year of the date of the issuance of this Notice of Apparent Liability.

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[2] The Commission's rulings in the program-length commercial area include the following: *Topper Corporation*, 21 FCC 2d 148 (1969); *American Broadcasting Companies, Inc.*, 23 FCC 2d 132 (1970); *Columbus Broadcasting Company, Inc.*, 25 FCC 2d 56 (1970); *Multimedia, Inc.*, 25 FCC 2d 59 (1970); *KCOP-TV, Inc.*, 24 FCC 2d 149 (1970); *Dena Pictures, Inc.*, 31 FCC 2d 206 (1971); *National Broadcasting Company*, 29 FCC 2d 67 (1971); *WUAB, Inc.*, 37 FCC 2d 748 (1972) and *WFIL, Inc.*, 38 FCC 2d 411 (1972); Public Notice, "Program-Length Commercials." (FCC 73-215), 39 FCC 2d 1062, 26 RR 2d 1023 (1973); *Taft Broadcasting Co.*, 39 FCC 2d 1070, 26 RR 2d 1025 (1973).

Under Section 1.621 of the Commission's Rules, you may take any of the following actions in regard to this forfeiture proceeding:

1. You may admit liability by paying the forfeiture within thirty days of receipt of this Notice. In this case you should mail to the Commission a check or similar instrument for $2,000 made payable to the Treasurer of the United States.

2. Within thirty days of receipt of this Notice you may file a statement, in duplicate, as to why you should not be held liable or why the forfeiture should be reduced. The statement may include any justification or any information that you desire to bring to the attention of the Commission. After consideration of your reply the Commission will determine whether any forfeiture should be imposed, and, if so, whether the forfeiture should be imposed in full or reduced to some lesser amount. An order stating the result will be issued.

3. You may take no action. In this case the Commission will issue an order of forfeiture after expiration of the thirty-day period ordering that you pay the forfeiture in full.

Commissioners H. Rex Lee and Reid absent.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-831

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of STEREOPHONIC BROADCASTERS, INC., ASSIGNOR and SCHOFIELD BROADCASTING CO., INC., ASSIGNEE For Assignment of License of KDFM (FM) and SCA, Walnut Creek, Calif.	File Nos. BALH-1624; BASCA-482

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 13, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. We have before us: (1) the above-captioned application; (2) a Petition to Deny; and (3) responsive pleadings. The Petitioner is Adler Communications Company, Inc., licensee of KWUN, a 500 watt daytime, directional, station on 1480 khz, in Concord, California. Concord is approximately 8 miles northeast of Walnut Creek.

2. The Petition to Deny was filed on February 22, 1972. At that time, the assignee herein, Schofield Broadcasting Company, Inc. (hereafter referred to as "Schofield Broadcasting") was also seeking to acquire Station KKIS, Pittsburg, California, by a separate application (File No. BAL-7505). Pittsburg is approximately 7 miles northeast of Concord, site of the Petitioner's KWUN. A main point in the Petition, relied on by the Petitioner to show its standing, is that the creation of a new AM-FM combination in Contra Costa County would have an economic impact on KWUN, which is geographically flanked by KKIS and KDFM. Thus, the Petitioner urged that the KKIS and KDFM applications were so interrelated as to constitute a package, which should be acted upon together by the Commission. However, no petition to deny the KKIS assignment application was filed.

3. The Broadcast Bureau reviewed the KKIS assignment application and found that Schofield Broadcasting was legally, technically, financially and otherwise qualified to acquire KKIS. It also considered the points raised in the present Petition and other pleadings as they related to the KKIS application and determined that action on the two applications could be taken separately. Accordingly, the Broadcast Bureau granted the application for assignment of the KKIS license to Schofield Broadcasting under its delegated authority on August 15, 1972. No petition for reconsideration was filed.

4. The Petitioner makes reference to two suits which were pending in the California courts at the time the Petition was filed. Both arose from the attempt by the Petitioner itself to purchase KDFM. The first was a suit by the minority stockholder of Stereophonic Broadcasters,

Inc., the assignor corporation, for the appointment of a referee to supervise the dissolution of the corporation, which had been previously agreed to by the two stockholders. This suit was motivated in part by the desire of the minority stockholder to accept a purchase offer of the Petitioner instead of that of Schofield Broadcasting. The second suit was by the Petitioner itself, asserting that a contract to sell the station to it had been entered into prior to the execution of the contract to sell the station to Schofield Broadcasting. The Petitioner prayed for specific performance of its contract, a restraint on the sale to Schofield Broadcasting and damages.

5. Since these suits sought to test the validity of the contract which forms the basis for the present application, action on this application was withheld, pending their outcome. On December 30, 1972, the referee appointed in the first suit submitted his conclusions to the California court. He stated, "The contract between Schofield Broadcasting Company, Inc. and Stereophonic Broadcasters is, in my judgment, more advantageous to the latter party than is the offer from Adler Communications Company, Inc." Subsequent to this report, the minority stockholder withdrew his opposition to the contract with Schofield Broadcasting.[1] On April 25, 1973, the California court rendered judgment in the second suit. Based on its finding that there was no contract between Stereophonic Broadcasters and the Petitioner, it held that "plaintiff take nothing herein against any defendant." [2] We conclude, therefore, that the present application is now ripe for our adjudication.

6. The Petition to Deny provides a description of the market where the Petitioner's station competes with KKIS and KDFM. It asserts that the acquisition of both KKIS and KDFM by Schofield Broadcasting would have an adverse economic impact on the Petitioner. In its Opposition to Petition to Deny,[3] Schofield Broadcasting interpreted this showing as an attempt to raise a "Carroll issue" (*Carroll Broadcasting Co.* v. *FCC*, 258 F. 2d 440, 17 RR 2066 (1958)). The Petitioner's Reply pleading [4] makes it plain, however, that it did not intend to raise such an issue by this showing, but merely sought to establish its standing. Since a "*Carroll* issue" has not been argued by the Petitioner, we consider that it is not before us. Further, we consider that the Petitioner made a sufficient showing of economic injury and therefore has standing under Section 309(d)(1) of the Communications Act. *Marion U. Moore*, 16 FCC 2d 351 (1969).

7. The Petitioner's first substantive point is that, as a matter of policy, Schofield Broadcasting should not be permitted to acquire both KKIS and KDFM, the only full-time stations in Contra Costa County. It asserts that a grant of the above-captioned application would give Schofield Broadcasting a monopoly from that standpoint. It argues that the desirable objective of diversity of ownership would not be

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[1] Correspondence, dated March 22, 1973, from Harry P. Warner, Esq., counsel for Schofield Broadcasting.

[2] Correspondence, dated April 30, 1973, from Harry P. Warner, Esq.

[3] Schofield Broadcasting filed its Opposition on March 24, 1972, after an unopposed request for an extension of time to that date.

[4] Adler Communications filed its Reply on April 4, 1972. Schofield Broadcasting moved to strike the pleading for lateness. Under our Rules, Sections 1.4(g) and 1.45(b). the Reply was due within 8 business days after the end of the period for filing the Opposition Thus, the Reply was due on or before April 5, 1972 and therefore it was timely filed.

advanced by a grant and that the effect of the acquisition would be to make KDFM an adjunct of KKIS. Finally, it urges that although the creation of new AM–FM combinations is permitted by our Rules, a combination of the only full-time stations in the county should require special justification.

8. Schofield Broadcasting points out in response that the Petitioner has set forth no economic data to support its position. Schofield Broadcasting also refers to representations made in its applications that, under its ownership, KKIS and KDFM would be separately staffed, programmed and sold to advertisers. Thus, it contends, KDFM would not be simply an adjunct of KKIS. Finally, it asserts that our Rules require no special showing for the creation of a new AM–FM combination.

9. It is true that diversity of ownership and the independence of FM stations are the *desiderata*. However in our reconsideration of our Multiple Ownership Rules, 28 FCC 2d 662 (1971), we considered these very factors in connection with the common ownership of AM and FM stations in the same market. We determined that there should be no rule barring the formation of new AM–FM combinations and we did away with the case-by-case approach to this question. Moreover, Schofield Broadcasting's operational proposals minimize the ill effects of common ownership. Thus, a hearing on this question is not required.

10. The Petitioner has sought to make an issue of the fact that a majority of the stock of Schofield Broadcasting is owned by nonlocal principals. While local ownership may be a factor of decisional significance in comparative proceedings, we have no policy or rule which requires any degree of local ownership by purchasers of broadcast stations. Thus, Petitioner's contentions of absentee ownership raise no questions which require a hearing.

11. The Petitioner next attacks the merits of the application itself, specifically the financing, ascertainment of community needs and programming. The pleadings filed by both parties in connection with the financing issue deal with the Commission's standards in this area, the validity of the assignee's projected revenues and expenses and the sufficiency of the assignee's showing of sources of funds.

12. Our evaluation of an applicant's financial qualifications in assignment cases centers on its ability to purchase the station and operate it for one year. *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965). Acquisition costs are ordinarily derived from the contract of sale. Operating expenses are projected on the basis of the station's prior performance. This approach to assignment cases obviates the need to resort to speculative estimates of revenues and expenses.

13. Under the terms of the present contract, Schofield Broadcasting will be required to make a down payment of up to $55,000. Monthly installments of principal and interest will not begin until the thirteenth month after closing. In addition, Schofield Broadcasting will pay the brokerage fee of 5% of the purchase price, or $9,750. The seller will pay the grant fee. With regard to the station's projected profit or loss, Schofield Broadcasting has stipulated that a loss of as much as $26,250 may be anticipated. (The confidential Financial Reports on file with the Commission indicate that this is probably an

overstatement.) Thus, Schofield Broadcasting must demonstrate the availability of at least $91,000.00.

14. Schofield Broadcasting is relying entirely on stockholder paid-in capital. Much of the Petitioner's argument against the availability of this capital has been mooted because Schofield Broadcasting has amended the application to show that the subscribed-for stock has now been purchased and paid in full. The application indicates the following purchases:

Dick Schofield	$87,500
Wayne Hoffman	168,200
Philip Hoffman	19,300
Karen Hoffman	19,300
Total	294,300

15. The Broadcast Bureau, in reviewing the application for acquisition of KKIS by Schofield Broadcasting, found that $134,684 would be required to be expended or committed in connection with that acquisition. Thus, there is a balance of $159,616, which is sufficient to cover the acquisition and operation of KDFM with a comfortable margin to spare. Thus we find that a hearing on a financial issue is not warranted.

16. The Petitioner next contends that Schofield Broadcasting's ascertainment of the needs and interests of the community is inadequate and not in conformance with the requirements of our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971), that the ascertainment ignores the unique characteristics of Walnut Creek, and that the programming proposed to meet the needs of the service area is inadequate and non-responsive. Schofield Broadcasting responded to those allegations by standing on its exhibits, which were amended on December 11, 1972.

17. We find that Schofield Broadcasting's ascertainment conforms to our *Primer*. The assignee has pointed out that the coverage area of KDFM is limited to Walnut Creek and its immediate environs. Utilizing data and information from the U.S. Census Bureau, the Walnut Creek Chamber of Commerce and the office of the City Manager of Walnut Creek, the assignee has submitted a demographic study of the service area. This study describes the population characteristics of the service area, its economic activities, governmental activities, public service organizations and the like. The picture which emerges is that of an affluent "bedroom community" for San Francisco and Oakland, which is 98% white with a scattering of Japanese, Chinese and black residents and which has an economy based largely on retail trade. This demonstrates an awareness of the distinct characteristics of the service area for the purpose of seeking out representative community leaders.

18. Dick Schofield, the president of Schofield Broadcasting, personally interviewed 38 community leaders in Walnut Creek and immediately adjacent communities during the two months preceding the filing of the present application. These leaders are identified by name and position and represent a cross-section of interests in the service area. An independent research firm was also commissioned to survey the general public and a random sampling of 100 persons was reached.

The population of Walnut Creek is approximately 40,000 and these efforts constitute reasonable compliance with our requirements. Our *Primer* invites challenges, supported by data, to show that a significant interest group has been omitted. Petitioner has made no such showing.

19. The problems elicited by these efforts are listed by the assignee and fall into the following main categories: planning, community support, communications, economics, drugs, transportation and law and order. Schofield Broadcasting evaluated the results of its surveys and has proposed to deal with the problems by means of a public affairs discussion program entitled "KDFM Public Forum." This program would be aired from 8:00 to 9:00 p.m. on Sunday evenings and would deal with the topics and issues which are of current importance to the community. From time to time the station would also carry a program called "Personal Opinion", which is produced by the staff of its KKIS. Since the coverage area of KKIS encompasses all of Contra Costa County, a particular edition of "Personal Opinion" may be relevant to the residents of Walnut Creek. When it is, it will be carried in the hour immediately following "KDFM Public Forum." Schofield Broadcasting will also editorialize as the need arises. We conclude from the above that Schofield Broadcasting has proposed to devote a significant proportion of its broadcast week to programs which are responsive to the particular needs and interests of the Walnut Creek service area.

20. The Petitioner contends that the acquisition of KDFM by Schofield Broadcasting, which already owns KKIS, would result in a duplication of operations by both stations, with a concomitant loss of public service and local programming to the county. Schofield Broadcasting has refuted this contention, pointing out that each station will be separately staffed, programmed and sold to advertisers.

21. There is no requirement that KKIS and KDFM must be separately programmed, despite the fact that they are the only full-time stations in Contra Costa County.[5] Moreover, the representations made by Schofield Broadcasting indicate that the stations will, in fact, be separately programmed, except for a possible one or two hours per week of public affairs programming. Although both KKIS and KDFM will be operated with a "good music" format, the county will not be losing a source of entertainment since, in each case, Schofield Broadcasting has simply proposed to continue the format of the previous licensee.

22. We found above that Schofield Broadcasting will carry public affairs programming, tailored to the Walnut Creek area, over KDFM. This programming is to be separate from the public affairs programming of KKIS, except where the problems of the listeners of both stations overlap. This degree of duplication is consistent with the coverage characteristics of the two stations and does not amount to a loss of one public affairs voice in the county.

23. The Petitioner next asserts that under Schofield Broadcasting the number of public service announcements will be reduced, the amount of public affairs programming will be reduced and local and

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[5] We also note that Contra Costa County is within the San Francisco-Oakland SMSA, which has a multiplicity of full-time broadcast services.

regional news coverage will be inadequate. In reply, Schofield Broadcasting again stands on the showings contained in the application.

24. The following table summarizes the programming of the assignor during the composite week prior to its most recent renewal and the programming proposed by Schofield Broadcasting:

	Assignor	Schofield
Weekly hours of operation	137	126
News ....percent..	8.0	8.2
Public affairs ....percent..	0	2.0
Other, except entertainment and sports ....percent..	4.0	4.0
Public service announcements per week	409	150

The pleadings show that the high number of public service announcements carried by the assignor and the total absence of public affairs stem from the fact that the assignor misunderstood our program classifications. Features intended by the assignor to be public affairs programs were, in actuality, public service announcements. Nevertheless, Schofield Broadcasting proposes to broadcast more public affairs programming than the assignor did in fact carry. Its proposal to carry a minimum of 150 public service announcements is not, in our experience, unreasonably low. Thus we cannot find that a deterioration of service issue has been raised.

25. Schofield Broadcasting has proposed to devote 30–40% of its news coverage to local and regional news. Since it has proposed ten hours of news per week, it therefore has obligated itself to provide approximately 30 minutes per day of local news. The Petitioner questions Schofield Broadcasting's sources of this news, but we are unable to conclude that this obligation cannot be met by utilizing personnel doubling as newsmen, wire services and the other customary sources of news, as proposed by Schofield Broadcasting.

26. Finally the Petitioner asserts that Schofield Broadcasting is behind attempts to effect a *de facto* change in the city of license of KKIS, from Pittsburgh to the more affluent Walnut Creek area. This allegation is made for the first time in Petitioner's reply pleading and is unsupported by affidavits of persons with personal knowledge thereof, as required by Section 309(d)(1) of the Communications Act. It is therefore insufficient to warrant a hearing. The Broadcast Bureau was therefore justified in previously granting the KKIS application. There are no other material or substantive questions of fact that remain unresolved.

27. Accordingly, in view of all the above and based upon our determination that the applicants are fully qualified and that the public interest would be served thereby, IT IS ORDERED that the Petition to Deny, filed by Adler Communications Company, Inc., IS DENIED and the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R-287

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of
SOUTHERN BROADCASTING CO. (WGHP-TV), HIGH POINT, N.C.
For Renewal of Broadcast License
FURNITURE CITY TELEVISION CO., INC., HIGH POINT, N.C.
For Construction Permit for New Television Broadcast Station

Docket No. 18906
File No. BRCT-574

Docket No. 18907
File No. BPCT-4302

MEMORANDUM OPINION AND ORDER

(Adopted August 9, 1973; Released August 10, 1973)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications were designated for consolidated hearing by Commission Order, FCC 70-706, 35 FR 11277, published July 14, 1970. By Commission Order, FCC 72-147, 37 FR 4304, published March 1, 1972, the applications were redesignated for hearing. Now before the Review Board is a petition to enlarge issues, filed June 1, 1973, by Southern Broadcasting Company (WGHP-TV), (Southern) seeking the addition of a network affiliation issue[1] against Furniture City Television Company, Inc. (Furniture City).[2]

2. Southern acknowledges that its petition is untimely, but maintains that good cause exists for its acceptance. Petitioner contends that it only recently became aware of the fact that Furniture City has not received a commitment from the ABC Television Network or even approached it concerning affiliation[3] although Furniture City's application, which proposes the affiliation, has been filed for almost four years.[4] Petitioner also contends that it is the network's practice not to

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[1] The requested issue reads as follows:

> To determine whether Furniture City Broadcasting Company, Inc. (Furniture City), will be able to obtain, or has reasonable expectations of being able to obtain, an affiliation with the American Broadcasting Company (ABC) television network as proposed in its application (BPCT-4302) and, if not, the effect on Furniture City's financial qualifications and its ability to effectuate its program proposals.

[2] Also before the Board for consideration are: (a) opposition, filed June 14, 1973, by the Broadcast Bureau; (b) opposition, filed June 14, 1973, by Furniture City; and (c) reply, filed June 21, 1973, by Southern.

[3] The Board's Memorandum Opinion and Order in *Western Communications, Inc.* (*KORK-TV*), 39 FCC 2d 1077, 26 RR 2d 1456, released March 9, 1973, appears to have prompted WGHP-TV's general manager to inquire of ABC's regional manager what arrangements, if any, Furniture City has made with the network for affiliation. In *Western,* a network affiliation issue was added against an applicant for a new station which was challenging a renewal applicant. WGHP-TV's general manager wrote to ABC on May 8, 1973, but the date of a previous verbal request for the information, which is referred to in the instant petition, cannot be determined from the pleadings.

[4] Southern notes that Furniture City, in an amendment to its application filed January 2, 1973, also proposes to broadcast 65 hours of network programming each week (50% of its proposed weekly programming).

entertain such proposals until an applicant has received a construction permit,[5] and that, furthermore, there is no reasonable basis to assume ABC would agree to an affiliation with Furniture City since none of its principals have had any prior commercial television broadcast experience and since its application does not indicate any particular expertise in program promotion or contain any unique local programming proposals.[6] Finally, petitioner opines that Furniture City's failure to affiliate with ABC may have a substantial effect on its ability to meet its financial obligations and effect its programming proposals. Both Furniture City and the Broadcast Bureau oppose the petition on procedural and substantive grounds.

3. Southern's petition will be denied. First the Board agrees with Furniture City and the Bureau that the petitioner has failed to show any good cause whatsoever for the late filing of its petition. *Cf. RKO General Inc.* (*WNAC-TV*), —— FCC 2d ——, 27 RR 2d 1537 (1973). Although our recent Memorandum Opinion and Order in *Western Communications, Inc.* (*KORK-TV*), *supra* note 3, may have prompted Southern to investigate Furniture City's proposed ABC affiliation, petitioner could have investigated the proposal much earlier since it was aware of it when the application was designated for hearing *over three years ago. Cf. Industrial Business Corp.*, 40 FCC 2d 431, 26 RR 2d 1542 (1973); *WHBL, Inc.*, 20 FCC 2d 372, 17 RR 2d 815 (1969). In addition, Southern delayed two months after the release of *Western* before writing ABC inquiring whether Furniture City has ever made arrangements with the network for affiliation.[7] Second, the petition is deficient on the merits. Although it appears from Furniture City's opposition that it does not now have a commitment from ABC to affiliate with the network if its challenge to Southern's license is successful, the Board agrees with Furniture City and the Bureau that, "in the circumstances of this case" (*Western Communications, Inc.* (*KORK-TV*), *supra*, 39 FCC 2d at 1080, 26 RR 2d at 1462), there is a reasonable presumption that ABC would agree to affiliate with the successor to WGHP-TV since there are only three operating VHF television stations in the Greensboro-High Point-Winston-Salem market[8] and the two other stations in that market are presently affiliated with the other two national networks.[9] Moreover, Southern's argument, that

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[5] This policy was expressed in a letter dated May 15, 1973, a copy of which is attached to the instant petition, from ABC's regional manager to WGHP-TV's general manager.

[6] Southern notes that, according to ABC's current affiliation policies, portions of which it attaches to its petition, experience of ownership and management, promotion plans and means of accomplishing them, and local programming proposals are some of the standards used by ABC in granting affiliation.

[7] In regard to the timeliness of the instant petition, it is interesting to note that the law firm representing the applicant against whom the network affiliation issue was added in *Western* represents the petitioner in this case. Also, the Western petition requesting a network affiliation issue was filed on October 6, 1972.

[8] WGHP-TV, the renewal applicant in this proceeding; WFMY-TV, Channel 2, Greensboro (CBS); and WSJS-TV, Channel 12, Winston-Salem-Greensboro-High Point (NBC).

[9] Compare *Western Communications, Inc.* (*KORK-TV*), *supra*, where the Las Vegas market was served by four VHF stations and the Board held that because the applicant did not have a commitment to affiliate with the network as it proposed, it was entirely possible that the network would choose to affiliate with one of the other operating VHF stations.

Furniture City will be unable to meet ABC's affiliation qualifications, fails to comply with the specificity requirements of Section 1.229(c) of the Commission's Rules, since it is totally unsubstantiated and based on surmise and speculation. See our prior Memorandum Opinion and Order in this proceeding, FCC 73R-275, released July 30, 1973.

Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed June 1, 1973, by Southern Broadcasting Company (WGHP-TV) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-835

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Application of
REBEL BROADCASTING OF MISSISSIPPI, ASSIGNOR
and
TRI-CITIES BROADCASTING CO., ASSIGNEE
For Voluntary Assignment of License of
Station WJMI(FM), Jackson, Miss.
File No. BALH-1658

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1973; Released August 13, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. Before the Commission is a Petition filed on May 3, 1973 by TAB Broadcasting Company, Inc. (TAB) which seeks reconsideration of our By Direction letter, dated March 29, 1973 (released April 3, 1973) in which we granted the above-captioned application for assignment of Station WJMI(FM), Jackson, Mississippi to Tri-Cities Broadcasting Company (Tri-Cities) and dismissed the "Petition to Deny" and numerous letters which were filed against the application by TAB. Also before us is an opposition a reply and other related pleadings.

2. TAB is the licensee of Station WKXI(FM) in Jackson, Mississippi which it operates with a black oriented format. In its "Petition to Deny" it contended that assignee's proposal to change the WJMI (FM) format to a black oriented format would deprive Jackson of its only "MOR format stereo broadcast service" and force Petitioner's station to discontinue operations or to change its black oriented format. Petitioner also contended that a grant would result in undue concentration of control and attempted to raise questions concerning the basic qualifications of Tri-Cities. Since TAB's Petition to Deny was filed 2½ months after the expiration of the time period for filing such petitions we dismissed it as untimely. However, we fully considered the merits of TAB's allegations as an informal complaint under Section 1,587 of our Rules and upon careful consideration of all of the matters raised we found no substantial and material questions of fact which required a hearing on the WJMI(FM) application. Accordingly, based upon our determination that assignee was fully qualified and that the public interest would be served thereby, we granted the WJMI(FM) assignment application.

3. The Petition for Reconsideration does nothing more than claim as error our failure to adopt Petitioner's interpretation of the law and facts concerning this assignment, which was consummated on April 3. 1973. Each of the allegations here made was made in its previous pleadings and complaints, with the minor exceptions of decisional un-

importance which are discussed in paragraph 4, *infra*. Each allegation was fully considered by the Commission in its March 29, 1973 letter. There is no specific showing that the Commission was in error in disposing of any of these allegations. It is well settled that reconsideration will not be granted merely for the purpose of debating again matters upon which we have once deliberated and spoken. *WEOK Broadcasting Corp.* 4 RR 2d 503 (1965); *Pacifica Foundation* 20 FCC 2d 648, 17 RR 2d 1073 (1969).

4. In its Petition for Reconsideration TAB states: "As of April 29, 1973, twenty-six days after WOKJ took over operation of WJMI–FM, monitoring revealed no religious programming/music whatsoever, despite assignee's promise of 22% religion." This bare allegation stands without further elucidation as to the period of monitoring, who performed it, or its significance, other than the innuendo—"Another possible misrepresentation?" In breaking down its proposed format, Tri-Cities referred to approximately 22% religious music and 60% rhythm and blues and popular music. It did not promise 22% "religion." Tri-Cities affirms that its proposed percentages for news, public affairs and other programming (in which religious programs would appear) will be maintained. Thus Petitioner's charges regarding WJMI(FM's) religious programming raise no substantial questions.

5. The Petitioner has submitted no facts to support its plea that public interest considerations demand a hearing to determine whether the assignee may change to a black oriented format. In its reply pleading TAB has attempted to bolster its contentions regarding the change of the WJMI(FM) format to a black oriented format by submitting copies of a column in the Jackson *Clarion Ledger* of June 16, 1973 containing two letters from members of the public concerning the lack of "good music" in the Jackson area. In disposing of TAB's prior arguments on this point we stated in our letter of March 29th that there was no indication that the assignee had abused its discretion in choosing its proposed format nor any indication that the proposed format of "rhythm and blues" is not reasonably attuned to the tastes and needs of the service area. TAB contends that the court's decisions in *Lakewood Broadcasting Service, Inc.* v. *FCC* (KBTR) U.S. App. D.C. #72–1757 and *Citizens Committee to Keep Progressive Rock* v. *FCC* U.S. App. D.C. #72–1675, both decided on May 4, 1973, and *Citizens Committee v. FCC* 436 F2d 263 (D.C. Cir., 1970), require the Commission to hold a hearing on this application. However, TAB fails to take into account the fact that in these cases there was an outpouring of petitions and/or letters to the Commission from substantial segments of the listening public protesting the proposed changes of formats. Here, the only protests we have received are those of TAB, which are apparently prompted by its desire to prevent or curtail competition from and additional black oriented format in the Jackson market. Since we received no substantial protests from the listening public and since there is no indication that the format chosen is not reasonably attuned to the tastes and needs of the Jackson community, the change of format raises no substantial questions.

6. With regard to the other allegations made by Petitioner, we have determined that they raise no substantial questions which require a

hearing on this application. As we pointed out in our By Direction letter of March 29, 1973, Tri Cities has been cleared of any trafficking questions when the Commission granted its application to acquire WOKJ–AM on March 10, 1971. This acquisition of a companion FM station in the same city where Tri Cities already has an AM does not so enhance its media interests so as to create an issue of regional concentration of control of mass media, as alleged by Petitioner. The other allegations, in the main, concern WOKJ, Tri Cities AM station in Jackson. These matters (e.g. alleged "deliberate exaggeration" to advertisers of WOKJ's coverage area and power, the alleged broadcast of announcements regarding a lottery and alleged "hypoing") have been raised by Petitioner in numerous letters to the Commission commencing on January 5, 1972 as well as in its late filed "Petition to Deny" and subsequent filings against the instant application. The Commission's Complaints and Compliance Division by letters dated February 14, 1972 and August 2, 1972, requested the comments of Tri Cities on these matters raised by Petitioner. The response of Tri Cities, dated May 3, 1972 and September 5, 1972, were considered and found to be acceptable by our Complaints and Compliance Division. These matters were also carefully considered by the Commission in connection with our review of the pleadings and letters filed by TAB against this application, and, as stated above, were found to raise no substantial questions which would bar a grant of or necessitate a hearing on this application. A hearing is not required to resolve undisputed facts or the inferences and legal conclusions to be drawn from such undisputed facts. Chuck Stone v. F.C.C. 466 F. 2d 316, 323 (1972).

7. In summary, we may properly look behind a licensee's (or proposed licensee's) programming judgments only where other facts exist which leave unresolved substantial or material questions of fact. We find that no such substantial or material questions of fact remain requiring an evidentiary hearing.

8. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by TAB Broadcasting Company, Inc. IS DENIED; and that our letter by Direction of the Commission, which granted the application of Rebel Broadcasting of Mississippi to assign the license of Station WJMI(FM), Jackson, Mississippi to Tri-Cities Broadcasting Company, is hereby AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R-299

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of UNITED BROADCASTING CO. OF FLORIDA, INC. For Renewal of License for Station WFAB, Miami, Fla.	Docket No. 19664 File No. BR-4447

MEMORANDUM OPINION AND ORDER

(Adopted August 20, 1973; Released August 22, 1973)

BY THE REVIEW BOARD:

1. By Order and Notice of Apparent Liability, FCC 72-1195, 38 FCC 2d 956, released January 2, 1973, the Commission designated the renewal application of United Broadcasting Company of Florida, Inc. (United) for hearing to determine whether the applicant has engaged in violations of Section 73.1205 of the Commission's Rules (fraudulent billing). Subsequently, by Memorandum Opinion and Order, 40 FCC 2d 187, 26 RR 2d 1617, released March 22, 1973, the Review Board added a meritorious programming issue in order to give the applicant an opportunity to mitigate any adverse findings under the fraudulent billing issue. Now before the Review Board is a petition, filed June 25, 1973, by the Broadcast Bureau, which requests that the meritorious programming issue be deleted from the proceeding.[1]

2. The Broadcast Bureau contends that in light of recent Commission and Review Board precedent, evidence of meritorious past programming is no longer material to the resolution of this proceeding. In support of this contention, the Bureau cites *KFPW Broadcasting Co.*, 40 FCC 2d 126, 26 RR 2d 1633 (1973), in which the Commission held that evidence of meritorious programming is inappropriate in mitigation of adverse findings under a qualifying issue inquiring into allegations of misrepresentation, bribery of network officials or "any other acts involving moral turpitude relating directly to the operation of a broadcast station . . ." The Bureau further relies upon *Western Communications, Inc.*, FCC 73R-233, 27 RR 2d 1286 (1973) in which the Review Board, relying upon the *KFPW* holding, specifically held that such evidence is not material to the resolution of a fraudulent billing issue.

3. In opposition, United alleges that the Bureau's reliance upon the holding in *Western Communications, Inc.*, *supra*, is misplaced be-

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[1] Other related pleadings before the Board for consideration are: (a) opposition, filed July 9, 1973, by United; and (b) Broadcast Bureau reply, filed July 13, 1973.

cause the facts of the instant case are readily distinguishable from those of *Western;* specifically, United asserts that the applicant, Western, was charged with willful acts of fraudulent billing, whereas United, according to the Bill of Particulars, is charged with acts which may be either willful or negligent. United further contends that the Commission intended the *KFPW* principle to apply only to alleged willful acts, and thus, where an issue is specified which encompasses acts which may be either willful or negligent, a licensee is entitled to present evidence of past meritorious programming in mitigation of adverse findings. Finally, United urges that it is entitled to retention of the meritorious programming issue on the basis of "substantial equity" because it has expended time and funds in preparation for hearing on that issue.

4. In reply, the Broadcast Bureau contends that the holding in *Western* is not predicated on a distinction between willful and negligent acts. Rather, the Bureau notes that the Board was explicit in holding that ". . . fraudulent billing involves that degree of culpable conduct which renders consideration of past programming as a mitigating factor inappropriate." In any event, the Bureau maintains that evidence of meritorious programming cannot be relevant in this proceeding. Thus, according to the Bureau, if the evidence adduced under the fraudulent billing issue warrants the conclusion that United does not possess the requisite qualifications to be a licensee, then no degree of meritorious programming will be sufficient to overcome this determination, and United's renewal application will be denied; if the evidence does not warrant such a conclusion, then no mitigation will be necessary and the renewal application will be granted.

5. In the Board's view, United's attempt to distinguish the instant case from Western reflects a misunderstanding of the issue involved. United's renewal application may be denied only if United is found to be *knowingly* involved in fraudulent billing practices; this requirement of scienter, therefore, is present regardless of whether the licensee itself has engaged in such practices, or has failed to exercise that degree of diligence necessary to ensure that its employees or agents do not engage in conduct which would violate the rule. Thus, fraudulent billing by definition involves that degree of culpable conduct which renders consideration of past programming as a mitigating factor inappropriate.[2] United's argument that the Bill of Particulars in this proceeding indicates that negligent conduct is encompassed within the issue must also be rejected; a bill of particulars serves the limited purpose of delineating the facts in issue and informing the applicant of the precise factual questions it will be required to resolve,[3] rather than setting forth the legal bases for resolving the issue. In light of our action in *Western Communications, Inc., supra*, and our discus-

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[2] According to Section 73.1205 of the Commission Rules, fraudulent billing results only from "knowingly" issuing false documents, or misrepresenting the nature or quantity of advertising.

[3] See *D and E Broadcasting Co.,* 1 FCC 2d 78, 5RR 2d 475 (1965).

sion above, consideration of meritorious programming evidence, as set forth in our Memorandum Opinion and Order, 40 FCC 2d 187, *supra*, has been rendered moot. Therefore, following the procedure utilized in the *Western* case, there is no need to delete the issue, and the Bureau's motion will be denied.

6. Accordingly, IT IS ORDERED, That the motion to delete an issue, filed June 25, 1973, by the Broadcast Bureau, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary*.